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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1942

No. 4

UNITED STATES OF AMERICA

vs.

WILLIAM R. JOHNSON

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR WILLIAM R. JOHNSON ON RE-ARGUMENT.

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This defendant, William R. Johnson, made a full and accurate statement of the facts with appropriate record references in his brief filed on the first submission, (pp. 5-34.) and this Honorable Court is respectfully referred to that statement for a narrative summary of the evidence. No such statement appears in the brief for the Government filed at the last term nor in the brief now filed on re-argument. A reading of this defendant's statement of the case will enable this Court to follow more readily the arguments of counsel in response to the four questions propounded by this Court in its order of May 4, 1942.

By its questions this Honorable Court indicates that it is considering the contention of this defendant that the verdict is not supported by the evidence in the only way it can be considered if it is to be determined on the record made. The evidence must be considered as to each count separately. This defendant cannot be guilty of an attempt to evade income tax for any year unless some tax was due for that year. (*Gleckman* v. *United States*, 80 Fed. (2nd) 394, 399; *O'Brien* v. *United States*, 51 Fed. (2nd) 193, 196.) Proof that he attempted to evade his tax in some unidentified year prior to 1940 is not sufficient to sustain a conviction for an alleged attempted evasion in 1936 or 1937 or 1938 or 1939. In order to answer the contention of the defendant that there is no proof to sustain the charges made by any of the four substantive counts and to answer the questions of this Court specifically directed to this issue, the evidence relative to each of the years covered by these counts of the indictment must be set apart and analyzed. The burden is on the Government to point to the evidence which shows that this defendant did not pay all the taxes due from him for the year 1936 and for the other years separately. This it cannot do by the shotgun method employed in both of its briefs. It must use a rifle if it wants to hit the bull's eye in answering this Court's questions so appropriately put in ordering re-argument of this case.

The brief for the Government opens with a criticism of this Honorable Court because it seeks by its questions to get an answer to the count by count contention of defendant Johnson that the evidence does not sustain the charges. It is argued that "the jury was entitled to take into account the entire mass of testimony pointing towards Johnson's ownership of the gambling houses" (pp. 5-6) in determining whether Johnson had received unreported income, however small a part of this hetero-

geneous "mass of testimony" was legal evidence and how ever far the "mass" missed the mark toward which it was pointed. Referring to this Court's questions, it is bluntly stated that "it is erroneous" to attempt to search the record for support of the "ownership" theory separate from the "expenditure" theory, and that the "correct approach" is to consider all of the testimony and exhibits *en masse*. (P. 5.) "The issue," so it is argued, "is not whether the verdicts can be sustained on any one of these elements, [the constituent elements of the questions,] considered separately, nor is it necessary to establish each of those elements; rather, the issue is simply whether the jury was entitled to conclude from the entire record that Johnson had received unreported income." (P. 6.) Attorneys for the Government persist in their refusal to defend the verdict count by count; perhaps because it cannot be done on this record.

Defendant Johnson welcomes this Court's questions. They are directly to the points involved on the issue of whether there is legal evidence to sustain the verdict against him on any of the five counts. He will answer these questions count by count directly and unequivocally.

First Question.

What evidence warranted submission by the trial court to the jury of the charges made as to each of the defendants (a) in each of the substantive counts, and (b) in the conspiracy count?

By two distinct methods the prosecution sought to sustain the allegations that defendant Johnson failed to report all of his taxable income for the years 1936 through 1939:

(a) By undertaking to prove that he owned a chain of gambling houses operated in and about Chicago and that all the proceeds of checks cashed and currency exchanged by persons operating these gambling houses were income from these gambling houses, and therefore that the aggregate of these financial transactions was the amount of the taxable income of this defendant and that this was in excess of the amount he reported; and

(b) By offering proof that he expended in certain years more cash that he had available for spending according to income reported and admitted assets.

The evidence offered to support the one theory in no manner supports the other. The Government accountant used only the evidence received under the gambling house ownership theory in arriving at the *amount* of this defendant's alleged income in the indictment years. (III. R. 742-745.) He admitted that there was no proof of unreported income in 1936 under the expenditure theory, (III. R. 759,) and that this defendant's reported income and admitted cash resources exceeded his expenditures in 1937, less living expenses from 1932 to 1937, by over $35,000. (III. R. 759-760.) We shall show that the "ownership" theory not only furnishes no support for the "expenditure" theory but that it destroys it. Admittedly, if defendant Johnson had the income which it is claimed he had from the gambling houses in any indictment year involved, then he had ample funds in any subsequent year to meet all claimed expenditures. While the attorneys for the Government give lip service to their contention that the one theory complements the other, when they come to make their computations of annual income under the gambling house ownership theory they ignore the expenditure theory, (pp. 52-53,) and when they make their computation of excess of expenditures over reported income and admitted cash resources they ignore the gambling house

ownership theory. (Appendix, Gov. brief.) It is absurd to argue, as they do, (p. 5,) that "The fact that Johnson's expenditures exceeded his known cash resources plus reported income furnishes strong support for the conclusion that he owned the gambling houses." This is strange logic.

Since we must argue the sufficiency of the evidence under the expenditure theory under Question 4, we shall here confine our argument to the sufficiency of the evidence under the gambling house ownership theory. We are confident that an examination of the record will show clearly that there is no evidence under the gambling house ownership theory that "warranted submission by the trial court to the jury of the charges made as to each of the defendants (a) in each of the four substantive counts, and (b) in the conspiracy count."

Preliminary to treating the evidence as it relates to the several counts, we shall answer some of the arguments made by the attorneys for the Government which they contend relate to all of the counts. An analysis of all the evidence will show:

1. There is no evidence that defendant Johnson was the sole owner of a group of gambling houses or of any gambling house.

2. There is no evidence shewing what per cent of interest, if any, defendant Johnson had in any gambling house.

3. There is no evidence of the amount of income derived from any gambling house.

4. There is no evidence of the amount of profits made by any gambling house.

5. There is no evidence that defendant Johnson had any knowledge of the banking or currency exchange transactions of any gambling house operator.

6. There is no evidence of the amount of money involved in any year in the banking or currency exchange transactions of any gambling house operator.

7. There is no evidence that defendant Johnson received any of the proceeds of such banking or currency exchange transactions.

It is argued for the Government that the twenty-five gambling houses named in the indictment were operated as a unit, (pp. 9-30,) and in support of this contention it is pointed out that one crew of workmen constructed or repaired some of these houses, (pp. 12-15,) that most of these houses received their horse race information from one service bureau, (pp. 15-18,) that the operators of some of these gambling houses visited each other occasionally and sometimes helped each other, (pp. 18-22,) that a few persons usually employed in gambling houses worked at different times in several of these houses, (pp. 22-24,) that on two or three occasions in eight years one operator borrowed equipment from another and that some of the operators used the same transfer man in moving equipment, (pp. 24-25,) that some of the operators used the same bus company in providing bus service to patrons to places in the country when city houses were closed, (p. 26,) and that three of the operators cashed checks and exchanged currency at the same currency exchanges. Pp. 27-30.

If all or some of these gambling houses were operated by the co-defendants as a unit, it would prove nothing against defendant Johnson without proof of his ownership of these houses and that he received income from them in one of the four indictment years greater than he reported for that year, but we shall not rest on the weakness of the case against defendant Johnson. We shall undertake to demonstrate that the contentions made for the Government are based upon a mass of disconnected

details of gambling house operations and trifling incidents and casual conversations spread over a period of eight years or more which do not even tend to prove that the twenty-five houses named in the indictment, or any of them, were a chain owned by one person, much less by defendant Johnson. Here again the attorneys for the Government mass the bits of testimony relating to twenty-five or more gambling houses in and about Chicago and create an atmosphere of substantial evidence as to some particular house operated by some co-defendant. The Court will note that they repeatedly refer to the testimony of two witnesses for support of their theory,—Nathan Cobb, (II. R. 348-373,) and R. J. Schumacker. (II. R. 174-192.) When the evidence as to each gambling house is analyzed and weighed it will appear that there is no support for the contention that the twenty-five named gambling houses were operated as a unit. Let us examine that evidence.

Horseshoe Club. The Horseshoe Club was located at 4721 North Kedzie Avenue in the city. Thomas Barnes had operated a gambling house at different locations in this neighborhood for several years and some time prior to his death in 1934 had established his club at this location. Late in 1934 co-defendant Jack Sommers acquired this property from Mrs. Barnes. (III. R. 809.) Thereafter he paid the rent. (Def. Ex. S-1 and S-2; III. R. 782-783,) hired and supervised all the employees, (III. R. 785-787,) and generally directed all operations. (III. R. 811.) Occasionally co-defendant James Hartigan, who was his close friend, would help Sommers as an accommodation when Hartigan's place was closed. (III. R. 817.) The fact that one of the forty-six gambling house employees who testified stated the conclusion that Sommers was a cashier at the Horseshoe in 1935 and that another stated the conclusion that Sommers was the night boss in

1937 and another that he was the day boss in 1939, (Gov. brief, p. 19,) is thin proof that Sommers was not the owner from 1935 to 1939. As owner he was the boss day and night, and worked in any capacity he chose. The statements of two witnesses that Hartigan became boss of the Horseshoe after the death of Barnes in 1934 and the statements of others that they saw him around the Horseshoe and thought he was one of the bosses, (Gov. brief, pp. 20-21,) are mere conclusions without foundation and certainly do not establish that Sommers was not the owner, or that this gambling house was part of a chain. No more weight can be given the testimony of three witnesses that Kelly was working as box-man at the Horseshoe in 1935 or 1936. (Gov. brief, p. 22.) These occasional services to Sommers by Hartigan and Kelly, if they took place, prove nothing material to this case. Add to this the fact that Sommers less than half a dozen times in five years "sent" or "recommended" some person for employment at another house, (Gov. brief, p. 23,) and that Sommers on two or three occasions arranged for transfer or bus service for some other operator, for which the user paid, (Gov. brief, pp. 25-27,) and the answer is still zero.

What the Court said in *Sorenson* v. *United States*, 168 Fed. 785, is particularly applicable to these few instances of the relations between Sommers and Hartigan and Kelly which throw no light on the question of whether Johnson failed to return all his income in 1936 and the other indictment years: (pp. 799-800)

> "A proper analysis of the pronouncements of courts favoring the admissibility of isolated instances of an inculpatory character, and the advisability of not excluding each disjected part merely because of its insufficiency to justify a conviction, will disclose that the parts held to be admissible come within the range

of legal competency, according to established rules of evidence as applied to the special facts and circumstances of the particular case. But they do not imply that mere suspicion is the equivalent of proof, or that mere hearsay testimony may be resorted to, or that unrelated, incompetent incidents and circumstances may become admissible because of the number of them. In law as in mathematics the multiplication of 0 by 2 does not make 1. In other words, a piece of evidence, which in and of itself is incompetent under settled rules of law, cannot be rendered admissible by attempting to link it up with some other fact or circumstance that might be competent. Otherwise, it is made possible to augment 1 by the mathematical absurdity of attempting to add to it 0."

Dev-Lin Club. The Dev-Lin Club is located at Devon and Lincoln Avenues outside the city limits. It was opened by Edward Wait in 1935. (III. R. 784, 895.) Sommers bought it at the end of the season (III. R. 812, 896) and thereafter paid the rent, (Def. Ex. S-4 (a-i); III. R. 784,) hired and supervised the employees, (III. R. 785-787,) and generally directed the house as his country location when his city house was closed. (II. R. 323; III. R. 786, 812.) As proof of the fact that Sommers was not the owner but that the Dev-Lin Club was part of a chain of gambling houses operated as a unit, the attorneys for the Government point to the testimony of five witnesses who related isolated incidents of Hartigan's visits to this house, (p. 21,) to the testimony of one witness who saw Flanagan once at the Dev-Lin Club and thought he was a boss, (p. 21,) to the testimony of another witness who stated that an unidentified Kelly was in charge of the roulette wheels, (p. 22,) and to a few other trifling incidents.

Sommers made a statement to some agents in December 1939 that he was the sole proprietor of the Horseshoe and

the Dev-Lin and that no one had been associated with him in their operation since he acquired them. (II. R. 467.) This statement of Sommers, (Gov. Ex. O-210; II. R. 467-471,) received in evidence on the offer of the prosecution over the objection of the defendants, is binding on the Government. (*Young* v. *United States*, 97 Fed. (2nd) 200, 202; *State* v. *Darrah*, 60 Idaho, 479; *State* v. *Hernandez*, 36 N. Mex. 35; *Spicer* v. *State*, 113 Tex. Crim. App. 616.) It stands as proof by the prosecution that the Horseshoe and the Dev-Lin were not units in a chain of gambling houses owned by someone other than Sommers. Defendant Johnson is entitled to the benefit of this evidence.

D. & D. Club. The D. & D. Club is located in a large store and office building at the intersection of Dearborn Street and Division Street known as the Lincoln Park Building, (II. R. 22,) and was operated by co-defendant William Kelly. (II. R. 257, 322, 386, 392.) Kelly rented his space through the Tavalin agency at $450 a month in 1936 and when he operated he paid his rent. (II. R. 14, 23.) Defendant Johnson has owned this building since 1933 and has returned his income therefrom in detail. (Gov. Ex. R 7-R 13.) When Kelly was closed he would get behind in his rent and Johnson forgave all or part of Kelly's arrearages just as he did those of other tenants. (II. R. 17-18, 27-28.) Kelly made the alterations and installations of gambling paraphernalia at his own expense. (III. R. 878, 885.) No witness testified that any other person was in charge of the operation of the D. & D. Club. The only testimony that our opponents can point to as supporting their argument that this house was a unit in a chain relates to two or three instances of a gambling-house worker going from another house to the D. & D. Club or going to another house from this club, (pp. 23-24,) a couple of instances of equipment being moved

to and from this house, (p. 25,) the hauling of patrons from this club to Harlem Stables on occasions when the D. & D. Club was closed, (p. 27,) and the use of currency exchange facilities by Kelly also used by Sommers and Hartigan. (Pp. 27-29.) When these incidents are spread out over three years they become mighty thin. Kelly's statement that he owned the D. & D. Club and that defendant Johnson had no interest in his house (Gov. Ex. 208; H. R. 458-460,) was offered in evidence by the prosecution and is binding on the Government and cannot now be disclaimed.

Harlem Stables Club. Harlem Stables Club was located at 4301 North Harlem Avenue. Co-defendant James Hartigan leased these premises in August 1936 and paid the rent thereafter to Walter Sass, a neighboring truck farmer who was the agent for the owners. (III. R. 804.) Thereafter, he operated this house. (II. R. 331, 384.) The testimony relied upon to show that this house was part of a chain showed that the workmen who made alterations and additions for Hartigan also did work on other houses, (Gov. brief, p. 13,) that co-defendant Sommers was about the premises during construction and that sometimes he did acts connected with the operation of the house which indicated to some observers that he was one of the bosses, (p. 19,) that Kelly on a few isolated occasions in 1937, 1938 and 1939 appeared to have something to do with the management, (p. 22,) that three or four employees came from other houses to Harlem Stables, (pp. 23-24,) that some gambling paraphernalia was moved from this house to the House of Niles and to Lincoln Tavern and from the Horseshoe and Lincoln Tavern to this house, (pp. 24-25,) that patrons were brought to Harlem Stables from city locations when the city houses were closed, (pp. 26-27,) and that Hartigan used the facilities of the same currency exchanges that were used by Sommers and Kelly. (Pp.

27-29.) Hartigan stated to Government agents that he was the sole proprietor of Harlem Stables, (Gov. Ex. O-209; II. R. 462,) and defendant Johnson is entitled to the benefit of this statement which was put in evidence by the prosecution.

Lincoln Tavern. Lincoln Tavern was a roadhouse located on Dempster Road in the country west of Evanston. The restaurant and bar were operated by Edward Wait in 1936, and Hartigan operated a gambling room in these premises before he opened Harlem Stables. (II. R. 346, 384; III. R. 896, 906.) On two occasions,—a week in the winter of 1936 and two weeks in the summer of 1937,—when the Horseshoe and the Dev-Lin were closed, Sommers moved his crew and equipment to Lincoln Tavern. (III. R. 787, 812, 848.) The only evidence to which the attorneys for the Government point to show that Lincoln Tavern was part of a chain of gambling houses is that the construction crew that made the alterations was the same as the crew that did work at some of the other locations, (Gov. brief, p. 12,) that one witness saw Flanagan at the door of Lincoln Tavern one evening greeting patrons as they entered, (pp. 21-22,) that Kelly worked as box-man there on one or two evenings in 1936, (p. 22,) that some equipment was moved between Lincoln Tavern and two other houses, (pp. 24-25,) that some patrons were hauled from the city to this country gambling house, (p. 26,) and that Lincoln Tavern used the same currency exchange facilities as some of the other houses. (Pp. 27-29.) The fact that Sommers operated in Lincoln Tavern for short periods when Hartigan was not using his space accounts for the moving of equipment between the Horseshoe and the Dev-Lin and Lincoln Tavern, (Gov. brief, p. 14,) and the presence of Sommers (p. 19) and some of his employees. (P. 23.) The fact that Hartigan operated Harlem Stables after he left Lincoln Tavern ac-

counts for his presence at different times at both places, (Gov. brief, p. 20,) and for his shifting of equipment from one house to the other. Pp. 24-25.

4020 Club. The gambling house at 4020 West Ogden Avenue and the nearby house at 2141 South Pulaski (formerly Crawford) were operated by co-defendant Flanagan. (II. R. 256; III. R. 892, 931.) The evidence on which the attorneys for the Government rely to put these houses in a chain is that Flanagan was once seen greeting acquaintances at Lincoln Tavern, (II. R. 296,) that Flanagan sent one of his employees to the Horseshoe back in 1933 when the Horseshoe was operated by Barnes, (II. R. 295,) and that patrons were once hauled from 4020 West Ogden to Harlem Stables. (II. R. 390.) Flanagan cashed his checks and exchanged his dealing money at a currency exchange never patronized by any of the other gamblers. (II. R. 552, 938-939.) It is difficult to conceive of a gambling house being less identified with other gambling houses in a city than was Flanagan's house with the other houses named in the indictment.

Other houses. Of the other gambling houses mentioned in the indictment, Reginald Mackay operated the Casino Club in the city and the House of Niles in the country, (II. R. 330, 339, 375, 382,) Andrew Creighton operated the Southland Club at 6245 South Cottage Grove Avenue in the city and the Club Western, the Vincennes Club, the Lake Park Club, the Select Club, the Club Proviso, and the 406 Club in outlying sections in and around Chicago, (III. R. 850-858,) and Edward Wait operated the Villa Moderne gambling room on a percentage basis for the proprietors of this roadhouse. (III. R. 896.) The gambling room at the Bon-Air Country Club was operated about a month in 1939 by Bon-Air Catering Company of which Wait was president. (III. R. 902, 910.) Mackay, Creighton and Wait were acquitted. The other seven

clubs named in the indictment were not identified with any defendant.

Much is made of the fact that these gambling houses got their race information service from one service bureau. (Gov. brief, pp. 15-18.) It is said that these "houses were interconnected by a private telephone exchange," (p. 9,) and that these "gambling houses were physically interconnected by a private telephone system." (P. 15.) Neither of these statements is true. The evidence is that each house subscribed for the service, was furnished with a one-way line from the service bureau over which news was broadcast in the room where race bets were placed and with a two-way line over which the subscribers could communicate by phone with the bureau. (II. R. 214; III. R. 932.) There is no evidence that one gambling house operator could talk to another through a switchboard at this service bureau. Each house had its own regular switchboard connection with the telephone company. (Gov. Ex. T-4 to 36.) There is no evidence that any of the gambling house operators knew anything about the arrangements of any other respecting the separate service bureau contracts. The evidence shows that houses, in no way identified with present defendants, were served from this bureau. (Houses in Cicero and others in Chicago at 3332 N. Milwaukee, 6825 N. Milwaukee, 3209 W. Ogden, 2133 S. Kedzie, 3946 W. School, 7515 N. Clark, 4911 N. Monticello and 4837 N. Elston; and all of the houses operated by Creighton, Wait and Mackay, who were acquitted; II. R. 195-215.) Flanagan's subscribers varied in number and were not steady. (III. R. 934.) A part of the service furnished was the taking of lay-off bets and of daily-doubles and this accounts for the checking of bets and the delivery to the service bureau of duplicate sheets mentioned at page 16 of the brief for the Government. (III. R. 933-934.) There is proof that bookmakers' supplies

were delivered to one Morgan at the store and office building where the service bureau occupied a second-story office, (III. R. 729,) but there is no evidence that these supplies were delivered to the bureau and supplied by it to any house conducted by any of present defendants. Sommers bought his supplies directly from Entry Service Company, Edward Don & Company and O'Neil & Company. (Def. Ex. S-12 to S-16; III. R. 811.) Other co-defendants bought from O'Neil. (III. R. 732-734.) There is no more basis for concluding that the owner of the service bureau owned the gambling houses served by it than there is for concluding that the businesses of telephone subscribers are owned by the telephone company or that the newspapers served by the Associated Press are owned by it.

This is the sort of evidence on which the prosecution relies to show that the houses of co-defendants Sommers, Hartigan, Kelly and others were mere units in a chain of gambling houses operated by some individual other than themselves and that they were merely employed managers with no other interest in their respective houses. The evidence does show that these men were friends, that they were all engaged in operating gambling houses, and that they accommodated each other when occasion presented itself. The fact that farmers in a neighborhood lend each other equipment and swap work occasionally would not be considered proof that all of their farms were owned by some individual or a syndicate. Nor would much significance be attributed to the fact that all of the farmers in a community did business with one bank or employed one accountant to make out their income tax returns or bought their supplies from a cooperative service company or hired the same trucker in marketing livestock. Occasional conversations and trifling incidents, which would not be considered as proof of anything if they

had occurred among people in other fields of endeavor, are grossly exaggerated in importance and given unnatural and even fantastic meaning just because the men involved are gamblers.

After satisfying themselves that "the evidence which has just been summarized was unquestionably ample to justify the jury's concluding that the important gambling houses named were not separately owned establishments but were operated and controlled under a single ownership," the attorneys for the Government then announce with amazing confidence that "The fact of single ownership having been established, the Government's evidence likewise identified Johnson with the houses in a number of ways and a multitude of instances which formed a most substantial basis for the jury's apparent conclusion that Johnson was the single owner." (Brief, p. 30.) We doubt whether this Court has ever seen a thinner case of ownership made than is made in this case. The proof would not be sufficient to establish title to an old straw hat in September much less title to properties which the Government contends are capable of yielding a million dollars a year income.

A point is made of the fact that Johnson owned the building at 4020 West Ogden Avenue, the building at 2141 South Pulaski Road (formerly Crawford Avenue), and the Lincoln Park Building at Division and Dearborn, the first two of which were rented to John Flanagan and space in the third to William Kelly. (Gov. brief, 30.) We submit that this does not even tend to prove that Johnson was the owner of the gambling houses located in these buildings. Johnson acquired an interest in the Lincoln Park Building in 1925 and became sole owner in 1933. (II. R. 11.) He bought 2141 South Crawford in 1929 and 4020 W. Ogden in 1931. (III. R. 972.) Flanagan paid his rent regularly and Johnson reported it as income. (Gov.

Ex. R 6-R 13.) Kelly made his arrangements for space in the Lincoln Park Building with the renting agent in 1936 and Johnson included as a part of his returns the report of this agency including the rent paid by Kelly. (Gov. Ex. R 11-R 13.) When Kelly was unable to pay his rent, Johnson approved the forgiveness of all or a portion of the rent due just as he did with other tenants. (II. R. 23, 27-28.) If these acts of Johnson as a landlord prove anything material to this case, they tend to prove that Johnson was not the owner of the gambling establishments located in his buildings. If Johnson was the owner of the D. & D. Club and desired to conceal his ownership by pretending to charge himself rent, then he would have paid all of the rent through Kelly to his rental agent and would not have gone through the useless procedure of charging himself rent and then forgiving it. The fact that Johnson installed air-conditioning in the quarters occupied by the D. & D. Club without increasing the rent (Gov. brief, p. 31) proves nothing. Many landlords make such improvements in their buildings to hold tenants who are in the buildings under leases favorable to the landlord. In this connection we point to the testimony of witness Carroll who testified that he solicited defendant Johnson to insulate his building at 4020 Ogden Avenue and that Johnson refused to make the improvement but said that Flanagan could do it if he chose. Later Flanagan gave the order and paid the cost. III. R. 892.

The mere fact that the construction crew, working under the direction of Roy Love, that did work for some of the co-defendants and other operators of gambling houses also did some work on Johnson's farm and at the Bon-Air Country Club, (Gov. brief, p. 31,) we submit is no proof that Johnson owned the gambling houses. The workmen who testified said that they were employed by Love who was their boss. (II. R. 128, 134, 235, 336.) There is no

testimony that Johnson had anything to do with the employment of the crew or the direction of the work. It is hardly conceivable that, if Johnson owned these gambling houses, as much work could have been done as the record shows was done, without Johnson being identified with it in some way.

The attorneys for the Government attach "particular significance" to the testimony of Lenz respecting some alleged conversations relating to Flanagan's contract for race information which he was purchasing from Nationwide News Service. (P. 32.) The witness testified that one of these conversations took place about 1935 at some place on Ogden Avenue. The witness was indefinite as to the date and the place and the conversation. His recollection was that there was some controversy with Flanagan about the rate being charged and that defendant Johnson was present and supported Flanagan in his protest. He said the account being discussed was Flanagan's account. (II. R. 151-152.) On cross-examination he said defendant Johnson had no account with Nationwide. (II. R. 161.) If this conversation occurred as related, it proves at most that Johnson was merely helping his friend and tenant Flanagan get a more favorable rate for information service. The witness was even more indefinite about his alleged conversation with Flanagan concerning rates in 1938 at the office of Nationwide. He first said that there was a conversation between himself and Flanagan and Mr. James M. Ragen, the manager. (II. R. 153.) By a leading question he was asked whether there was a conversation when defendant Johnson was present and he said that he believed there was another conversation but that he could not recall whether Johnson was present but he hardly thought he was. (II. R. 154.) When, notwithstanding this answer, the Court asked, "What did Mr. Johnson say about it if he said anything?" the witness

answered, "He said it was not worth—this is going back and I had to deal with many, many subscribers—I can't recall." When neither the prosecutor nor the Court could get the witness to commit himself that defendant Johnson was present at any of these conversations at the headquarters of Nationwide News Service, the Government was permitted to read from a statement which Lenz had given to some Government agents before he took the stand and this is the statement which is quoted at page 32 of the brief for the Government. Obviously, the admission of the witness that he made the statement to the agents is not proof that defendant Johnson made the statement credited to him in the statement of the witness but is proof merely that the witness made the statement to the agents. This statement offered by the Government (and, we submit, improperly received,) to impeach its own witness cannot be considered as an admission of Johnson. (*Southern Railway Co.* v. *Gray*, 241 U. S. 333, 337; *Purdy* v. *People*, 140 Ill. 46, 52.) Thus this testimony of "particular significance" comes to naught.

Another isolated incident which it is claimed shows defendant Johnson's ownership of the alleged chain of gambling houses is a purported conversation with one Atlas, (Gov. brief, p. 33,) who says that he met defendant Johnson at Lincoln Tavern about December 1935 and that Johnson asked him about installing an accounting system in the restaurant and bar. He says that on the same evening he also met Roy Love and Edward Wait and that he worked with Love on the books and that he made his monthly reports to Wait. (II. R. 305.) Wait testified that he was the owner of the restaurant and the bar at Lincoln Tavern and that he arranged with Atlas for installation of the accounting system. (III. R. 906.) Whatever the facts, surely this incident occurring in 1935 does not prove that defendant Johnson owned either the gam-

bling room in Lincoln Tavern or any part of the other twenty-four gambling houses named in the indictment in 1936.

Another grain of sand which is dropped in the scale against Johnson is an occurrence at the Dev-Lin Club some time in 1936 or 1937 when a dispute arose as to the call on crocked dice and the player left the table and defendant Johnson undertook to pacify him and finally offered to pay out of his own pocket the $10 or $15 which the player had lost. (Gov. brief, p. 34.) The player, Pollack, was a regular gambler and knew defendant Johnson, and his description of the incident indicates that Johnson was merely trying to prevent an unpleasant argument in a gambling house and that the witness did not regard Johnson as the proprietor and attached no significance to Johnson's effort to pacify him. (II. R. 379-380.) We submit that this is pretty thin testimony on which to base ownership of the Dev-Lin, much less of the other gambling houses alleged to make up the chain.

Another incident which the attorneys for the Government would like to have this Court consider as proof that Johnson owned the Horseshoe is a conversation outside the presence of Johnson which is alleged to have occurred between a woman gambler and co-defendant Sommers some time in 1938 about the limit on Red and Black. (P. 34.) The witness claimed that she later talked with Johnson about this matter and that he told her he would get in touch with Sommers, but she declined to state who went with her when she went to see Johnson, and she admits that nothing was done about changing the limit on the game. (III. R. 572-573.) This certainly approaches the nadir in evidence.

Much is made of an incident occurring at the time Harlem Stables was opened at which Johnson was present.

(Gov. brief, pp. 34-36.) If the Court will read the cross-examination of Russell Glave (II. R. 288-290) and of Glenn Glave (II. R. 292) and then read the testimony of the disinterested witnesses Walter Sass (III. R. 804-805) and Earl Jackson (III. R. 805-807), it will see that the Glaves took advantage of a situation in 1936 to shake down co-defendant Hartigan who paid a small price through his friends (he was home ill, III. R. 806) to buy his peace rather than risk a public fight with the Glaves, and also that if defendant Johnson had yielded to their demand during the trial to pay them another $500 (II. R. 288-289, 292) they would not have testified in this case. The receipt of evidence giving details of the controversy between the Glaves and Jackson respecting the ownership of Harlem Stables, which carried the implication that defendant Johnson and co-defendants "muscled" the Glaves out of their place of business and "robbed" them of fixtures and stock claimed to be worth $3,500 and then bought them off by paying to them and to former employees $600 to procure the withdrawal of the complaint filed with the State's Attorney, involved proof which indicated complicity in the commission of other crimes and left the suspicion that Johnson may have bribed the State's Attorney through the Glaves' lawyer, who was said to be the State's Attorney's cousin. This proof was altogether immaterial, (*Coulston* v. *United States*, 51 Fed. (2nd) 178, 180; *Weil* v. *United States*, 2 Fed. (2nd) 145, 146,) and its receipt was reversible error. Certainly the incident is slight proof that defendant Johnson was the sole owner of Harlem Stables, much less that he owned the other gambling houses in the alleged chain.

Much is made of the fact that defendant Johnson was instrumental in procuring employment in gambling houses for a few of the scores of employees who testified for the prosecution. (Gov. brief, pp. 36-37.) All but four of such

witnesses,—Cieslik (II. R. 222), Greenberg (II. R. 233), Weeks (II. R. 276), Coote (II. R. 315), Lebbin (II. R. 322), Meyer (II. R. 328), Leonard (II. R. 339), Wolfson (II. R. 387), Singer (II. R. 396-397),—admitted that Johnson merely recommended them for employment and that they were employed by and worked for the respective operators of these gambling houses. Only Schumacker (II. R. 177-178), Didier (II. R. 225), Kehoe (II. R. 309), and Cobb (II. R. 351-352) testified that Johnson directed the operator to put them to work. If we accept as true the alleged direction of Johnson to Sommers to hire Schumacker to work at the Horseshoe (Gov. brief, p. 36) and the alleged direction of Johnson to Hartigan to give Kehoe $10 a week until he could get a job (Gov. brief, p. 37), these directions are nothing more than requests from Johnson to these gambling house operators to take care of a couple of men who were unemployed. Didier admitted on cross-examination that Johnson helped him get jobs because he had a large family and needed work. (II. R. 226-228.) These isolated acts of kindness certainly do not tend to prove that Johnson was the owner of these gambling houses. The testimony of these witnesses indicated, as Johnson admitted, that Johnson was frequently solicited to aid unemployed men to get work and that he had in many instances been able to help men get employment in gambling houses. In this respect he was much in the same position as a political leader who is able to get jobs for others with the public officials.

It is true, as stated at page 38 of the brief for the Government, that a number of witnesses testified that they had seen Johnson in some of these gambling houses. Only Cobb, the see-all hear-all tell-all witness, testified that defendant Johnson was in some of these gambling houses several nights a week and that Johnson acted like "the head of the house". (II. R. 350-352.) It is strange

that of the scores of gambling house employees who testified for the prosecution only Cobb saw and heard so much of a confidential character.

The attorneys for the Government are certainly scraping the bottom of the barrel when they take the robbery incident at 4020 West Ogden Club in 1933 as proof of ownership of this club by defendant Johnson in 1936 and thereafter. (P. 39.) Other incidents relied upon to prove ownership are that Johnson was seen walking around the Dev-Lin and the Lincoln Tavern at the time construction was going on in 1935. (Pp. 39-40.) The prosecutors come back to old man Cobb at page 40 of the brief for the Government for proof that Johnson was present at the Dev-Lin in 1936 when the gambling equipment was being moved out and remarked "Well, it is all off," and at page 41 for proof that Johnson in a conversation at the House of Niles, in protest against intercession with him by politicians to get employment for their constituents at the gambling clubs, exclaimed, "I am not a politician by profession, I am running gambling houses." In picking up bits of evidence that helped to carry out the prosecutors' theory that Johnson was "the head man" at these gambling houses, Cobb was a marvel.

Reference is made to the statement of Johnson dated March 27, 1939, (Gov. Ex. O-207,) in which it is claimed he said that as to certain houses where he gambled, "That's my own gambling houses". (Gov. brief, p. 41.) We are surprised that responsible lawyers would represent to this Court that this is an admission by Johnson that he owned gambling houses, when the whole context of the statement is considered. This statement was taken in the office of an Internal Revenue Agent where Mr. Johnson was subjected to questions by three investigators. The stenographer states that she was called into the room after the interview had been in progress for some time

and that she took down such questions and answers as she was directed to take. There is nothing to indicate that Johnson ever saw the statement after it was transcribed. It was not signed by him. (II. R. 407-410.) Johnson began the formal statement with the assertion that he did not own any of the gambling houses which had been under discussion and that he was not in partnership with anybody who was operating a gambling house and that he did not share in the profits of any gambling houses. (II. R. 410.) Later he named the proprietors of the gambling houses where he played. (II. R. 414.) Throughout the interview he stated over and over again that he had no interest in these gambling houses, and yet the attorneys for the Government lift out of this statement what a stenographer has transcribed from notes and vouch for its accuracy. Obviously Johnson said, after naming the places where he gambled, (II. R. 414,) "That's my only gambling houses", or something to the effect that these were the only houses where he gambled, and not, "That's my own gambling houses".

In this connection we should call attention to another straining of the record which we think is unfair to the Court. In trying to show that Hartigan was a mere subordinate of Johnson, reference is made to a note delivered to Hartigan signed "Bill", which read, "Put bearer to work". (P. 70.) On the trial the prosecutor undertook to leave the impression that the "Bill" who signed this note was defendant William R. Johnson, (II. R. 345,) and that attempt at deception is rejected here. In the brief for the Government no reference is made to the cross-examination where the witness makes it clear that the note which he says he handed Hartigan was from William Rosenthal. (II. R. 348.) By the wildest stretch of the imagination one cannot find in the testimony of witness Ehrlich any support for the implication, intended to be

conveyed by this statement in the brief for the Government, that defendant Johnson wrote this note.

Another incident, which is cited as indicating that Sommers was a subordinate of defendant Johnson, is described in the testimony of witness Bissell who borrowed some money from Sommers and who has not repaid it. (III. R. 817-818; Def. Ex. S-30.) This argument is based on the hearsay testimony of Bissell that when he asked for the loan Sommers said he would have to get in touch with the boss and when the witness asked who the boss was Sommers told him it was Mr. Johnson. (Gov. brief, p. 68.) The attorneys do not show the Court that on cross-examination Bissell said that Sommers used a dial phone to talk to the boss, (III. R. 550,) whereas Government witness Moore, a local telephone company manager, testified that the telephone at the Horseshoe Club location was a hand set and that there was no dial phone service in that neighborhood. III. R. 704.

Much is made of the fact that accountant Brantman prepared income tax returns for Johnson through 1935 and prepared returns for some of the other defendants during the same period and that Johnson and three of the other defendants changed to accountant Radomski in 1936 and that some of the others used Radomski's services later. Gov. brief, pp. 41-43.

When Brantman first related the incident of his introduction to Sommers in 1932 he did not say that Johnson introduced him or that Johnson made any reference to his relation to Sommers, but he merely said that Johnson was present and asked him to explain to Sommers about the Government making a drive for returns from persons engaged in illegal pursuits. (II. R. 421.) It was after an overnight recess that the prosecutor brought the witness back to the conversation and led out of him the statement

that Johnson said, "Meet my man Sommers." (II. R. 429.) When the attorneys for the Government resort to this kind of truck to put a man in the penitentiary they are getting pretty low on evidence. On cross-examination Brantman admitted he had no memorandum of conversations he reported as having taken place nine or ten years prior to the trial, (II. R. 435,) and that he could not remember whether the purported conversation regarding the Government drive occurred in 1931, 1932, 1933 or 1934, and that he fixed the time as 1932 because that was the time he started filing returns for some of the co-defendants. (II. R. 436.) He also admitted that in July and August 1940, just preceding the trial, he had about six conferences with the prosecuting attorneys and that altogether he was interviewed twelve or fifteen times over the period of the investigation of Johnson. (II. R. 436.) So many interviews are not required just to learn what a witness knows. While Brantman denied on cross-examination that it had been suggested to him in these many conversations that his license to practice before the Department of Internal Revenue was in jeopardy if he did not testify to suit the prosecutors, he admitted that there had been conversation to the effect that as a man admitted to practice before the Treasury Department he was looked upon as the equivalent of a government representative and should conduct himself accordingly. (II. R. 453.) When Brantman had his first interview with Sommers at the Horseshoe Club it was located at 4750 North Kedzie and was operated by Barnes. (II. R. 439.) Brantman admitted that he had been preparing and filing Barnes' returns and that it might have been Barnes who introduced Sommers to him. (II. R. 440.) It was Brantman's practice to take memoranda of lump figures of income furnished by his gambler clients and then have them sign a blank form of return and then outside their presence he would type into the return over the signature of the taxpayer such description of occupa-

tion and source of income as he chose. (R. 441, 445, 448, 450.) Surely the Court will not give much credit to the testimony of a public accountant who by his own admission is guilty of gross unprofessional conduct and who was soliciting defendant Johnson to get him business from other gamblers. As far as we are advised, he has not lost his license to practice before the Treasury Department.

We shall show in answering Question 2 that there is no competent evidence of the *amount* of the income of the gambling houses named in the indictment and that there is no evidence in the record from which one could even guess at the *amount* of profits of these gambling houses, and so we pass without further attention here the generalisms decorated with big figures appearing on page 44 of the brief for the Government.

One would assume from the argument appearing on pages 45 to 50 of the brief for the Government that defendant Johnson had the burden of proving his innocence. We think he has done just that; but he was not required to prove either that he had paid all the taxes due from him or the source of his income. The burden of proof in a criminal case never shifts to the defendant. (*Chaffee & Co.* v. *United States*, 18 Wall. 516, 545; *McKnight* v. *United States*, 115 Fed. 972, 974; *Melton* v. *United States*, 120 Fed. 504; *Minner* v. *United States*, 57 Fed. (2nd) 506, 512.) It is the settled law that unless there is substantial evidence of facts which excludes every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused. (*Paddock* v. *United States*, 79 Fed. (2nd) 872, 876; *Nicola* v. *United States*, 72 Fed. (2nd) 780, 786; *McClintock* v. *United States*, 50 Fed. (2nd) 839, 842; *Dickerson* v. *United States*, 18 Fed. (2nd) 887, 893; *Grantello* v. *United States*, 3 Fed. (2nd) 117, 118.) and that where the evidence for the prosecution is as consistent with innocence as with guilt, a

judgment of conviction will not be sustained by a reviewing court. (*Gargotta* v. *United States*, 77 Fed. (2nd) 977, 984; *Dahly* v. *United States*, 50 Fed. (2nd) 37, 43; *Vinciquerra* v. *United States*, 21 Fed. (2nd) 508, 510; *Bishop* v. *United States*, 16 Fed. (2nd) 410, 417; *Harrison* v. *United States*, 200 Fed. 662, 664.) The law requires that there be more than some evidence of guilt. (*Towbin* v. *United States*, 93 Fed. (2nd) 861, 866.) The proof must be of that substantial character which leaves an abiding conviction that the accused is guilty of the offense charged.

All of the testimony respecting the keeping of records of gambling house transactions and destroying these records (Gov. brief, p. 50) was hearsay as to Johnson and was highly prejudicial. It is difficult to conceive of evidence more likely to inflame the minds of the jury against a defendant in a case of this character than evidence that the records of his business have been destroyed. (*Bryan* v. *United States*, 17 Fed. (2nd) 741, 742.) No proof was received that Johnson had any knowledge of these records or of their destruction.

In the summaries appearing on pages 52 and 53 of the brief for the Government appears the statement that currency was "deposited" at the Albany Park Currency Exchange. No currency was deposited at this exchange or at any other exchange. Exchanges are not depositories; they are mere depots where checks are cashed and money is changed. They receive no deposits and make none except in the carrying out of the service which they sell to the public. The statement that checks were "deposited" by the Lawrence Avenue Currency Exchange at banks with which it did business conveys a false impression. The checks were taken to the bank by the exchange and listed on deposit slips but the manager of the exchange carried away with him the proceeds of the checks. There was no such thing as an account at the Central National Bank

with a balance of $886,499.30, as the tabulation for 1939 might indicate. This figure is merely the guess of accountant Clifford arrived at by taking 74.87% of some figure. (Gov. brief, p. 60.) If the facts were honestly stated, what is meant to be said is that the aggregate of all the daily check-cashing transactions by the Lawrence Avenue Currency Exchange with the Central National Bank in 1939 was $886,499.30 or some other large figure.

It is noted that the totals of checks cashed by Sommers, $111,578.60, and of currency exchanged by him, $100,000, at the Northern Trust Company in 1936 are included in the computation of "total income of gambling houses". (Gov. brief, p. 52.) These Northern Trust transactions will serve to illustrate the character of all such check-cashing and currency-exchanging transactions, which are the *sole* basis for the *amount* of income charged to Johnson. While the checks cashed during 1936 totalled the sum indicated, there was no proof that a group of checks totalling $3,000 cashed one day did not represent the same money which Sommers received in cash from a similar group of checks cashed a few days earlier. There is as much reason to assume that the cashing of checks every few days represented a turn-over of the same money as there is to assume that the proceeds of the different batches of checks cashed represented new money. None of the proceeds of these checks were deposited. The currency was carried away by Sommers. The tellers estimated that Sommers came in about eighteen times a year with a bundle of worn currency averaging about $5,000 and that he would exchange this for new currency, taking about $3,000 in $5 bills and about $2,000 in $20 bills or $100 bills. The tellers were unable to say, as obviously they would be, whether the currency exchanged represented one bankroll exchanged eighteen times in 1936 and therefore involved only $5,000, or whether it represented new money each

time and so totalled about $90,000. None of this currency was deposited.

We shall not stop here to analyze the check-cashing and currency-exchanging transactions at the various exchanges which are discussed at pages 53 to 64 of the brief for the Government, but shall save this for the appropriate place when we answer the Court's Question 2. We must, however, state emphatically that the statements that the transactions of the Horseshoe, Lincoln Tavern, D. & D. and Harlem Stables were handled "through a single account" (Gov. brief, pp. 27, 29, 50, 58) are not accurate. There was no account. Each check-cashing transaction was separate and distinct from every other. If the check cashed at the exchange was paid in due course the transaction was closed. If the check was not paid, then the one who cashed the check at the exchange was required to make it good. The exchange kept a list of the checks cashed and the last endorser so that it could protect itself against bad checks. We should also say at this point that there is no evidence that Johnson had any knowledge of these currency-exchange transactions or that he received a dollar of the proceeds of the transactions.

At several places in the brief for the Government it is asserted that certain witnesses could not be found. It would have been more accurate to say that the agents did not find (instead of "could not find") these witnesses, considering the feeble effort that was made, as shown by the testimony of Agent Sloan. He testified that he sought to locate Joe Conroy by inquiring of the manager at defendant Johnson's farm on July 17, 1940, by calling at 550 West Roscoe Street, Chicago, July 19, 1940, and by passing that address several times on July 28, 1940, and looking for a car described as belonging to Conroy. This was the total effort to locate Conroy. (III. R. 777-778.) The only effort made to locate Roy Love consisted

of going to the Village of Wheeling, Illinois, August 8, 1940, and sitting at the crossroads in the center of town and watching for him to pass, and on the same day checking the cars at Bon-Air Country Club to see whether his was parked there, and on August 13, 1940, calling at 1642 West 69th Street, Chicago, said to be Love's home. (III. R. 779.) The total effort of this man-hunter to find Frank Vase consisted of talking, August 9, 1940, to the postmaster in the district in which he was supposed to reside. (III. R. 780.) All of this evidence was received over the objection that it carried the implication that defendant Johnson was concealing witnesses. Many other witnesses were interrogated about their knowledge of the whereabouts of persons who were not produced by the prosecution. There was no showing that Johnson had any knowledge of the whereabouts of any of these persons or that he had contacted them or that he had done anything to cause them to absent themselves. Such testimony was highly prejudicial to defendant Johnson and has been repeatedly condemned by the courts. *McWhorter* v. *United States*, 281 Fed. 119, 120; *People* v. *Sharp*, 107 N. Y. 427; *Sunderland* v. *United States*, 19 Fed. (2nd) 202, 208; *People* v. *Stanley*, 47 Calif. 113, 118.

And now that we have cut away the underbrush, let us examine the evidence count by count to see whether there are any solid trees in the forest,—the "mass of testimony". We shall show that there is no competent evidence that defendant Johnson owned any gambling house and that there is no competent evidence that he received any income from any gambling house. We feel that this examination of the evidence count by count will demonstrate conclusively that the answer to the Court's first question is that the competent evidence in the record did not warrant the submission by the trial court to the jury of the charges made as to defendant Johnson (a) in each of the four substantive counts, or (b) in the conspiracy count.

As to Count 1—Year 1936.

Defendant Johnson reported an income of $173,382.90 in 1936 and the Government failed to sustain its burden of proof that he had a greater income.

When we come to consider whether Johnson owned any of the gambling houses named in the indictment, the evidence as to each gambling house involved must be considered separately. Proof that Johnson owned all or any part of any gambling house operated by Flanagan, if there were any such proof, would not be proof that he received income from the clubs operated by Sommers or Kelly or Hartigan or any other person. The only evidence which could have any bearing on Johnson's ownership of any gambling house during 1936 would be that testimony which related to conversations, acts or transactions of Johnson during that year or years prior thereto. Conversations, acts and transactions of co-defendants and others outside the presence of Johnson and with which Johnson was in no way connected by proof are hearsay as to Johnson and cannot be considered under the first count of the indictment.

We ask in all sincerity, what evidence is there which shows that Johnson had any interest in Flanagan's establishments in 1936? Flanagan operated a gambling house alternately at 4020 West Ogden and at 2141 South Crawford (now Pulaski) and a service bureau located at 2135 South Crawford (now Pulaski) which was later located at Irving Park and Cicero. The fact that Johnson owned the buildings at 4020 West Ogden and at 2141 South Crawford where Flanagan's gambling house was operated, and leased these buildings to and collected rent from Flanagan, which rent he returned as income, is not proof that Johnson owned the gambling house operated in these buildings. It is proof to the contrary. Certainly Hayes' testimony

that Johnson spoke excitedly to Flanagan concerning a robbery which had occurred at the 4020 Club in 1933, assuming it is true, does not tend to prove that Johnson owned that gambling house in 1936. The testimony of Lenz regarding a purported conversation between him and Johnson and Flanagan at some place on Ogden Avenue at some time in 1935 regarding a dispute between Lenz and Flanagan over the service charge for racing news service, assuming it is true, is not that substantial evidence of ownership of the gambling house operated in Johnson's building at 4020 West Ogden which the law requires in a criminal case. Each of these incidents occurring prior to 1936 is zero as evidence and zero added to zero still makes zero. (*Sorenson* v. *United States*, 168 Fed. 785.) The income tax returns of Flanagan prepared by Brantman prior to 1936 and by Radomski in 1936 were hearsay as to Johnson. (*Greenbaum* v. *United States*, 80 Fed. (2nd) 113, 125; *Fox* v. *United States*, 45 Fed. (2nd) 364, 365; *Brown* v. *United States*, 298 Fed. 428, 430,) but if they are held to be admissible against him they do not even tend to prove that Flanagan was an employee of Johnson or that Johnson had any interest in Flanagan's establishments. These are all of the incidents appearing in the record relating to Johnson's connection with Flanagan during or prior to 1936. Leaving grounds of incompetency out of consideration, under such evidence can it be seriously contended that the total of the currency exchanged and checks cashed at the Lawndale Currency Exchange by Flanagan and his employee Couch should be charged to Johnson as income in 1936? Except rent paid, not a dollar of Flanagan's money was traced to Johnson. There is no proof that Flanagan received a net income from his gambling house or his service bureau in 1936 which he did not report, and we think it clear that under the most elementary rules there is a complete lack of evidence neces-

sary to support a deduction that Johnson received taxable income from Flanagan's establishments in 1936.

Kelly opened the D. & D. Club at the Lincoln Park Building at Dearborn and Division in 1936 and operated there for a short period. The fact that Kelly rented space in this building, owned by Johnson since 1933, through the rental agent Tavalin, and that Johnson reported such income as he received from this building, is proof that Johnson did not own the gambling establishment of Kelly, rather than that he did. There is no proof that Johnson had any connection with the D. & D. Club in 1936 or that any person, much less Johnson, received taxable income from this gambling house in that year.

Sommers acquired the Horseshoe Club from Mrs. Barnes in 1934 and the Dev-Lin Club from Mr. Wait in 1935. Going back to 1932, we find that Brantman, who had been preparing income tax returns for Johnson since 1925, testified that he told Sommers at Johnson's request that the Government was making a drive for returns from persons engaged in illegal pursuits. This conversation occurred, if at all, at least a year or two prior to the time when Sommers became the proprietor of the Horseshoe and the Dev-Lin. The fact that Johnson and Sommers both switched to Radomski for accountant's services in preparation of their returns in 1936 is a coincidence which proves nothing. The stories of Cobb, Didier and Singer that Johnson helped them get work with Sommers are uncertain as to detail, as is natural because of lapse of time, and, if believed, are not evidence of Johnson's ownership of Sommers' establishments. Neither the workmen who made repairs at Sommers' locations nor the men who furnished bus, transfer and storage service to Sommers testified that Johnson had anything to do with their employment. The Northern Trust Company tellers and the Albany Park Currency Exchange manager testified that

their dealings were with Sommers only and that Johnson was in no way connected with these dealings. This is the proof relied on by the Government to connect Johnson with Sommers' gambling houses in 1936. This evidence does not even establish facts from which the inference of ownership can be drawn, much less the many facts necessary to warrant the conclusion that the aggregate of Sommers' check-cashing and currency-exchanging transactions represented income of Johnson. The attorneys for the Government reach their conclusion by piling inference on inference and hopping from assumption to assumption with wild abandon. That any money handled by Sommers in 1936 ever reached Johnson is pure conjecture.

Hartigan operated the gambling room at Lincoln Tavern during the winter of 1935-1936 and opened the gambling establishment at Harlem Stables in the summer of 1936. The only testimony relied on to connect Johnson with Lincoln Tavern was that of Schultz that he saw Johnson looking over construction work one evening in 1936, and of Atlas that Johnson asked him to install a bookkeeping system in the restaurant at Lincoln Tavern. The only testimony tending to show that Johnson had an interest in Harlem Stables relates to a series of events in August 1936 growing out of the controversy with the Glaves, who claimed that they were the owners of the property prior to its being taken over by Hartigan and that they were entitled to the money that Hartigan had paid Earl Jackson as the purchase price. The Glaves were so thoroughly impeached by their own admissions on cross-examination and by the testimony of disinterested witnesses that no credit should be given to the fantastic story told by them, but, if we assume that Johnson advanced the money to settle their claims and if we assume that this incident tends to show that Johnson had some interest in Harlem Stables, it certainly falls far short of proving that he

owned this gambling house or that he had any income from it in 1936. There is no proof that the gambling room at Lincoln Tavern and the gambling house known as Harlem Stables yielded a profit in 1936 greater than that returned by Hartigan, much less that Johnson received income from these places which he did not report. No Hartigan money was traced to Johnson.

There is no evidence worthy of credit that these gambling houses were operated as a unit, but if the evidence received for this purpose were accepted with all of the intendments which may be reasonably drawn from it, it would establish not that Johnson was the sole owner or that he had any interest in these houses, but that some of the co-defendants had some working arrangement under which they cooperated in the promotion of their respective businesses in the operation of these houses or some of them. The facts that persons usually employed in gambling houses worked first for one and then for another as business required, that one proprietor took his customers to an open house when his house was closed, and that these gambling house proprietors used one crew of workmen to make repairs, one transfer man, one storage house, and one bus company, do not even tend to prove the charges in Count One of this indictment. These facts prove merely that these co-defendants of Johnson, followed generally a common pattern in the conduct of their respective gambling houses, and if the facts tended to prove any crime it was a conspiracy to violate the laws of the State prohibiting the operation of gambling houses.

There is no competent evidence which shows any income tax due from Johnson in 1936. He paid $78,550.70 for this year.

As to Count 2—Year 1937.

Johnson reported an income of $264,177.63 in 1937 and the Government did not prove that he had income in excess of this amount.

Taking into consideration the conversation, acts or transactions of Johnson during 1936 and prior thereto which we have already discussed, and adding those of 1937, we find no competent evidence that Johnson was the owner of the gambling houses operated by his co-defendants, nor even evidence that he was financially interested in these houses. As to Flanagan's places there was no testimony of conversations or acts or transactions of Johnson in 1937. As to Kelly's place, there is the testimony of Grushkin relative to the installation of air-conditioning at the D. & D. Club and the testimony of Tavalin that Kelly's back rent amounting to $1,800 was settled for $100. These transactions relating to Johnson's operations as a landlord did not prove that Johnson was the owner of the D. & D. Club, one of his tenants, but they tend to prove the contrary. As to Sommers, Lebbin testified that Johnson spoke to Sommers about giving Lebbin employment at the Horseshoe, and Pollack testified that Johnson offered to return money lost by him when a stick man called crocked dice at the Dev-Lin. We submit that these isolated incidents prove nothing material to the issues. Bissell's testimony that Sommers telephoned the "boss" about making him a loan and that Sommers told him that the boss was Johnson is rank hearsay as to Johnson. As far as Hartigan's places are concerned the only testimony regarding 1937 transactions is that of Cobb, who said he was employed at the Lincoln Tavern after talking with Johnson, but he did not say Johnson hired him. There was no proof that these houses yielded an income in 1937 greater than the aggregate returned by Flanagan, Hartigan, Kelly and Sommers.

There was not a syllable of proof that Johnson received any income from any of these houses in 1937. Johnson paid a tax of $128,399.72 for this year. The Government wholly failed to sustain its burden of proving that there is any other tax due from Johnson for 1937.

As to Count 3—Year 1938.

Johnson reported an income of $121,137.65 for 1938. We submit that there is no competent evidence in the record supporting the Government's contention that he had a greater income for this year.

What new testimony is there which tends to connect Johnson with the establishments of his co-defendants? Under pressure of cross-examination by the Court and the prosecuting attorney, Lenz stated that this was the year Johnson called at the offices of Nationwide News Service to discuss the rates that were being charged Flanagan's service bureau. It will be remembered that on cross-examination Lenz was uncertain as to the time of the conference, who was present and what was said, and that he finally stated that Johnson was not present. The five volumes of Nationwide customer accounts, (Gov. Ex. O-11 to O-15,) do not show an account with defendant Johnson. Assuming this discussion occurred, it does not prove that Johnson owned the service bureau and it does not even tend to prove that the service bureau yielded a profit in 1937 or that the owner of the service bureau owned the gambling houses subscribing to its service. There was no evidence even tending to connect Johnson with Flanagan's gambling house at 4020 West Ogden or 2141 South Crawford. As to the D. & D. Club, Tavalin testified that Johnson waived some more of Kelly's back rent and he also testified that Johnson did the same thing with respect to many other tenants. Weeks testified that he got a job at the D. & D. Club after talking with Johnson.

but he made it clear that Kelly employed him and directed his work. The only additional testimony with respect to Sommers' establishments relating to Johnson's connection with them in 1938 was the testimony of Schumacker that Johnson told Sommers to put him to work, the testimony of Kehoe that he was given $10 a week at the Dev-Lin at Johnson's direction, the testimony of Didier that he was employed at the Horseshoe on the recommendation of Johnson, and the testimony of Rebman that she talked with Johnson about the limit on Red and Black at the Horseshoe. Assuming this testimony to be true, and it was all denied, it does not prove that Johnson owned the Horseshoe or the Dev-Lin and certainly does not even tend to prove that Johnson received any income from these places in 1938 which he did not return. There was no new testimony relating to 1938 which showed that Johnson had any connection with the Hartigan places.

On the theory that Johnson owned these gambling houses and received income from them in 1938, which he did not report, there is a total failure of proof. There is no proof that a dollar of the proceeds from the cashing of checks or exchanging of currency by his co-defendants came into Johnson's hands. Johnson paid a tax of $34,530.94 for 1938. The Government did not prove that any other tax was due for that year.

As to Count 4—Year 1939.

Johnson reported an income of $269,048.48 for 1939 and the Government failed in its attempt to prove that he had a taxable income in that year which he did not report.

There is no new proof of ownership from Johnson's conversations, acts or transactions in 1939 which are worthy of characterization as evidence. As to the D. & D. Club there is proof that his agent waived some more of Kelly's back rent, which is the course he followed with

other tenants who could not pay. As to the Horseshoe, there was the testimony of Lang and Wolfson that Johnson helped them get jobs with Sommers, but no proof that Johnson employed them. There was nothing to connect Johnson with the establishments of Flanagan, Hartigan and other co-defendants. The Government's whole case for 1939 is based on the unsupported claim that Johnson owned the Lawrence Avenue Currency Exchange operated by Brown and that the sum total of the numerous transactions shown by the so-called "Reserve for Uncollected Funds Account" on the books of this exchange represented taxable income of Johnson. This is "mere guesswork and speculation." *Benn* v. *United States*, 21 Fed. (2nd) 962, 963.

There was no competent evidence to support the conclusion that Johnson owed a tax for 1939, above what he paid. There is no proof of the amount of the tax paid but the taxable income reported was $251,715.47.

As to Count 5—Conspiracy.

The case for the prosecution under the conspiracy count rests entirely on illogical deduction from a mass of disconnected acts, transactions and declarations. This record contains hearsay evidence of conversations and acts and transactions in no way connected with defendant Johnson running back into the 20's, more than ten years before the year of the first substantive offense charged in the indictment. The whole course of the prosecution was to lift itself over the fence by its own bootstraps. (*Glasser* v. *United States*, 62 Sup. Ct. 457, 467.) It used testimony concerning the acts and declarations of the various co-defendants and others done or made outside the presence of defendant Johnson to establish the existence of a conspiracy and that he was a party to it; and used the same testimony on the assumption of a going conspiracy to

make the proof of the same acts and declarations by alleged co-conspirators done or made out of the presence of Johnson competent evidence against him. This was clearly error. Before the declarations of alleged co-conspirators can be received in evidence against one charged with participation in the conspiracy, it must be shown by independent evidence that a conspiracy existed and that the accused was a party to it at the time the declarations were made. *Logan* v. *United States*, 144 U. S. 263, 308; *Mayola* v. *United States*, 71 Fed. (2nd) 65, 67; *Nibbelink* v. *United States*, 66 Fed. (2nd) 178, 179; *Feigenbutz* v. *United States*, 65 Fed. (2nd) 122, 125; *United States* v. *Renda*, 56 Fed. (2nd) 601, 602; *Pope* v. *United States*, 289 Fed. 312, 315; *Stager* v. *United States*, 233 Fed. 510, 513.

The whole course of the prosecution is an effort to substitute for proof inference piled upon inference and assumption based upon assumption. The language of Judge Hutcheson in *Symonette* v. *United States*, 47 Fed. (2nd) 686, so aptly describes the case at bar that we adopt it: (p. 687)

> "This is one of those cases, of which the books contain too many instances, of an effort by the government, on a conspiracy indictment, to supply the place of testimony by piling inference upon inference; of an effort to make deduction take the place of proof; and to have the jury, by reasoning backward from non-criminal acts, build up by inference a state of facts to make them criminal, which, if they in fact exist, the evidence ought to have established."

We recognize that a conspiracy may be proved by circumstantial evidence, but it is well established that where the evidence leaves the essential element of an unlawful agreement open to conjecture a verdict for the defendant should be directed. (*United States* v. *Ross*, 92 U. S. 281,

284; *Mackett* v. *United States*, 90 Fed. (2nd) 462, 464; *Dowdy* v. *United States*, 46 Fed. (2nd) 417, 423; *Linde* v. *United States*, 13 Fed. (2nd) 59, 61.) The mere fact that men are associated in an enterprise, even though it be illegal, is not proof, without more, that a specifically alleged conspiracy exists and that each is a member of that conspiracy. *Wiborg* v. *United States*, 163 U. S. 632, 659; *United States* v. *Falcone*, 109 Fed. (2nd) 579, 581; *Dowdy* v. *United States*, 46 Fed. (2nd) 417, 423.

Even if the evidence showed that one or more of the co-defendants knew that Johnson was attempting to evade the payment of the income tax due from him, which it does not, this would not of itself establish the alleged conspiracy. Mere knowledge of or acquiescence in the illegal act of another, without an agreement to cooperate to accomplish the object of the actor, is not enough to constitute one a party to a conspiracy with him. *Nations* v. *United States*, 52 Fed. (2nd) 97, 105; *Thomas* v. *United States*, 57 Fed. (2nd) 1039, 1042; *United States* v. *Peoni*, 100 Fed. (2nd) 401, 403.

The conspiracy charged in the indictment to defraud the United States of income taxes due from Johnson could have been established only by evidence that Johnson owned the gambling houses operated by the co-defendants, that he received income from them, and that the income received was greater than that reported in his returns, together with proof that Johnson's alleged co-conspirators knew that he had an income greater than that which he reported and that with knowledge of this fact they aided Johnson to evade income tax by helping him conceal his taxable income. Failure to furnish proof to support the substantive counts amounts to failure to furnish proof to support the conspiracy count. The conspiracy count is merely a combination of the charges contained in the substantive counts. There might be a conspiracy to defraud the United

States of income taxes due upon an individual's income which did not amount to an attempt by that individual to evade income taxes for a particular year but that is not this case. There has not been and we do not think there could be in reason a contention made that the conspiracy count was sustained if the proof fails to sustain the substantive counts. If the Government has failed to prove under its gambling house ownership theory that Johnson had a larger income than he reported, as we contend it has, it has likewise failed to prove the conspiracy charged.

We think it clear that the circumstantial evidence on which the Government relies under the conspiracy count does not exclude every other hypothesis but that of guilt and that it was the duty of the trial court to instruct the jury to return a verdict for the accused on Count Five.

Second Question.

In the circumstances of this case, is proof of gross receipts sufficient to establish that net income resulted from the operation of any enterprise in which respondent Johnson is alleged to have been interested?

Under the gambling house ownership theory the only evidence on which the attorneys for the Government rely to show the *amount* of Johnson's income is the evidence which shows the aggregate of the several check-cashing and currency-exchanging transactions. This evidence, we shall show, does not prove the *gross receipts* of the gambling houses, much less the *net income* of these houses. All that this proof tends to show is the money handled by the operators of these gambling houses in a business in which there was a daily turnover of capital. Without the slightest hesitation we answer the Court's second question in the negative.

The result for each of the years as shown by the summaries at pages 52 and 53 of the brief for the Government arises from the assumption that Johnson was the sole owner of the gambling houses operated by his co-defendants, added to the assumption that there was a net income from these gambling houses, added to the assumption that the aggregate of the checks cashed and currency exchanged represented the net income of these gambling houses, added to the assumption that this total amount was paid to Johnson, added to the assumption that the totals for the respective years shown in the summaries represented taxable income of Johnson. This basing of assumption upon assumption is squarely within the condemnation of *United States* v. *Ross*, 92 U. S. 281, 284; *Whealton* v. *United States*, 113 Fed. (2nd) 710, 713; *Mackett* v. *United States*, 90 Fed. (2nd) 462, 464; *Gargotta* v. *United States*, 77 Fed. (2nd) 977, 981; *Parlton* v. *United States*, 75 Fed. (2nd) 772, 776; *Nations* v. *United States*, 52 Fed. (2nd) 97, 105; *Dahly* v. *United States*, 50 Fed. (2nd) 37, 43 and *Ribaste* v. *United States*, 44 Fed. (2nd) 21, 23.

The entire argument of the attorneys for the Government in their attempt to answer this question consists of one guess after another. (Brief, pp. 82-91). They start off with the astonishing statement that without proof of the amount of receipts from gambling houses the jury could reasonably conclude that the receipts were large because no one would engage in this business if it were not profitable. Then they argue that since the gambling house proprietors kept no bank accounts, it is reasonable to infer that the money received from the cashing of checks and the exchanging of currency was all net profit. They next jump to the conclusion that the taking of some of the proceeds of these check-cashing and currency-exchanging transactions in money of large denominations was the equivalent of making bank deposits, and then they make

the final plunge and cite cases which hold that where it is shown that a taxpayer is engaged in a business which is producing an income and large sums of money are traced directly into his bank account and he has filed no return, or a return showing an income much less than the accumulations in his bank account, such evidence may be considered by the jury in determining whether the taxpayer has returned all of his taxable income. Brief, p. 84.

In the first case cited, *Gleckman* v. *United States*, 80 Fed. (2nd) 394, Gleckman was directly identified with several business enterprises, some legitimate and some illegitimate, and there was direct proof of more income from these business enterprises than Gleckman had reported, and on top of this there was proof of large bank balances accumulated during the indictment years, which indicated income over and above that reported. In holding this evidence competent, the Court said (p. 399): "If it be shown that a man has a business or calling of a lucrative nature and is constantly, day by day and month by month, receiving moneys and depositing them to his account and checking against them for his own uses, there is most potent testimony that he has income, and, if the amount exceeds exemptions and deductions, that the income is taxable." But the Court also held in this case that "The burden was upon the Government to prove that an income tax was due from Mr. Gleckman for the years in question over and above the amount returned,—he could not be guilty of attempting to evade or defeat tax unless some tax was due." Directly applicable to the case at bar is the Court's additional statement, (p. 399.) "nor would the bare fact that he received and cashed a check for a large amount in and of itself be sufficient to establish that income tax was due on account of it." In the case at bar there is not a syllable of proof that Johnson ever received and cashed the checks involved, much less that he got and retained any of the proceeds of the checks.

The second case cited is *United States* v. *Wexler*, 79 Fed. (2nd) 526. There the proceeds for the operation of an outlaw brewery, which the taxpayer admitted he owned, were traced into his bank account which showed a large and growing balance. It was proved that Wexler lived on a scale beyond his declared income and that he fled when Government agents sought to question him. That is not the case at bar. Here there is no competent evidence that Johnson owned the gambling houses or that he was interested in them. There is no evidence that any proceeds from these gambling houses went to Johnson. There is no evidence that Johnson lived on a scale beyond his declared income and there is no evidence that Johnson ever sought to avoid an audit of the annual returns filed by him over the past twenty years.

Another income tax evasion case where bank accounts were used to show unreported income is *Paschen* v. *United States*, 70 Fed. (2nd) 491. Among the bank accounts of the accused was one maintained under the fictitious name of "A. B. Anderson". It appeared that large deposits were made in this account in 1927 and 1928 and some of these deposits were identified as items which should have entered into the return of income for 1927. The prosecution contended that since these identified items had not been included in the income reported for 1927 it could be presumed that the large unidentified portion of deposits made in that account during 1927 represented unreported income of Paschen, unless the contrary appeared. As to this contention the Court said: (p. 497)

> "The Anderson account was as much Paschen's own account as if it had been carried in his own name. About this there is no controversy. But as to the unidentified balance appearing to have been deposited in the Anderson account during that year, we believe it involves too much of speculation to admit of in-

> dulgence in the presumption that, because a few of the items making up the large Anderson account were shown to have been of commercial accounts not included in the tax return, it therefore follows that the large unidentified balance of deposits in the account represents also commercial accruals during the year, not included in the tax return. This contention of the Government cannot be allowed."

If this indulgence in the presumption that the unidentified balance represented taxable income of Paschen "involves too much of speculation", how can it be seriously contended that the indulgence of the attorneys in this case in the assumption that the money handled in the unidentified banking and currency exchange transactions of others was taxable income of defendant Johnson, does not involve speculation of the wildest character? *Without any evidence connecting Johnson with any of these transactions and without any evidence as to the amount involved in the transactions it is sought to charge defendant Johnson with the aggregate of the transactions of the particular year as money received by him during that year.*

The attorneys for the Government next guess that the amounts involved in the check-cashing and currency-exchanging transactions represented the balance of the preceding day's business after the payment of the houses' gambling losses, payroll and other expenses. (Brief, p. 85.) This conclusion does not follow from any established premise, but is a mere assumption based on another assumption. When the gambling house operator exchanged his worn working money for new working money, he had exactly the same amount of money after the exchange as he had before. If the operator accumulated $1,000 of checks on Monday and cashed them on Tuesday, he could use the proceeds of these checks for cashing other checks and paying losses and meeting the payroll on Wednesday. The

check-cashing and currency-exchanging transactions were mere turn-overs of money and afford no evidence of an accumulation of profits. The totals are not amounts of gross receipts, much less of net income, of these gambling houses.

Much is made of the fact that a substantial part of the currency received in these transactions was in $100 bills. The most reliable of the witnesses testifying as to check-cashing and currency-exchanging transactions are the Northern Trust Company's officers. They had nothing to fear and they told the facts as nearly as they could remember them. According to their testimony the proceeds of these transactions were taken in currency of various denominations, generally about three-fifths of the total being taken in $5 bills, about four-fifteenths in $20 bills and the balance in $100 bills. (III. R. 604-605.) These large bills were used to pay large winners. (II. R. 218; III. R. 859, 939.) When a gambler finished winner he would be asked to leave his small bills so that they could be used for dealing. (III. R. 816, 879.) None of these $100 bills were traced to defendant Johnson. While he made large investments with currency he used bills of various denominations ranging from $10 to $1,000. The prosecution started out to connect Johnson with the gambling houses by proving that the gambling house proceeds were reduced to $100 bills and that Johnson bought property and paid for it in $100 bills, but in this the prosecution utterly failed.

Another point that should be made before we take up the count by count analysis is the inconsistency of the position taken by the attorneys for the Government with respect to the interest which they contend defendant Johnson had in the gambling houses. There are included in the brief for the Government (pp. 52-53) summaries which purport to show the "total income of gambling houses".

Here apparently the "gambling houses" no longer mean the twenty-five houses named in the indictment but mean only the Horseshoe Club, the Dev-Lin Club, the D. & D. Club, Harlem Stables and Lincoln Tavern. In order to sustain the contention that the "total income of gambling houses" for the respective years was defendant Johnson's income, the evidence must show that he was the *sole* owner. However, the attorneys for the Government never make the unequivocal contention that Johnson was the sole owner but content themselves with saying that he had "a dominant interest in the gambling houses", (p. 4,) or that he had "an interest in the gambling houses", (p. 65,) and similar expressions. When it is conceded that Johnson was not the *sole* owner but that he had merely *some* interest or even a *dominant* interest in the gambling houses, the premise for concluding that he received all of the income from such houses is destroyed. It was for this reason that the Circuit Court of Appeals held that the circumstantial evidence on which the Government relied to establish that Johnson was the owner of these gambling houses, considered in the light most favorable to the Government, established only that Johnson had some interest in the gambling houses and did not establish that he was the sole owner and therefore entitled to all of the proceeds. Having found this state of facts, the Court concluded that it was rank speculation to assume that Johnson received from these gambling houses more income than he reported. I. R. 195.

Now let us analyze the summaries of the Government year by year.

As to Count 1—Year 1936.

The prosecutors arrive at the *amount* of "total income of gambling houses" in 1936, which they guess is Johnson's income, by adding the aggregate of check-cashing and

currency-exchanging transactions totalling $485,294.57. The details are as follows:

Checks cashed at Albany Park Currency Exchange	$255,415.97
Currency deposited at Albany Park Currency Exchange	6,790.00
$100 bills received from Lawndale Currency Exchange	11,600.00
Checks cashed at Northern Trust Company	111,578.60
Currency exchanged at Northern Trust Company	100,000.00

We shall first consider the Northern Trust transactions because they are first in point of time and the evidence respecting them is from reliable sources. It appears that co-defendant Sommers cashed checks there from January 2 to May 27, 1936. The bank sheets showing these over-the-counter transactions indicated the checks cashed by Sommers by recording him as the last endorser. (Gov. Ex. X-170 and X-171.) The proceeds of these checks were not deposited but were carried away by Sommers. (H. R. 504.) Sommers had been receiving this service since 1934. (H. R. 505.) He came in on an average of two or three times a week. (H. R. 503, 507.) This would be about fifty times during the five months, so that the average total of the checks cashed at each trip would be about $2200. Assuming all of these checks were cashed by Sommers for gamblers, which is contrary to the fact, what does it prove? It proves merely that persons coming to the Horseshoe or the Dev-Lin to gamble cashed checks with Sommers before they started or after they had lost what currency they brought with them. The checks do not represent profits to Sommers because the maker may have continued to play after he cashed the check and finished winner. When Sommers returned from the bank with the proceeds of the checks he cashed on Monday he had the same money that he had before he cashed the checks for his patrons. When he went back on Wednesday to cash another batch of checks amounting to $2200, the money in these checks may very well have been the same money that he received from cashing the batch of checks on Monday. Thus we see that counting the item of $111,578.60

as net income of Sommers' gambling houses in 1936 is just day-dreaming. The figure is not even an amount of gross receipts.

Now let us look at the $100,000 item of alleged income of Sommers represented by the currency exchanged at the Northern Trust Company. Teller Denning tried to give the facts respecting these transactions with Sommers, but it must be remembered that he was telling of events occurring from two to six years prior to the time he was testifying. The bank had no record of these transactions. (III. R. 605.) It was Mr. Denning's recollection that Sommers came to him about three times a month, for six months out of the year and brought worn currency to be exchanged for new. Sommers would take mostly new fives and possibly a package of twenties. Generally speaking, there would be about $3,000 in fives and about one time out of three the $2,000 would be in hundreds. (III. R. 604.) Thus it appears that in each month Sommers would get about 1800 fives, 200 twenties and 20 hundreds, and in the year 1936 he would have gotten about six times this number of each denomination. The witness estimated the total at $100,000 and that is the figure the Government uses. On cross-examination the witness said, as he was bound to say, that he did not know whether the $5,000 brought in by Sommers on these trips was one bankroll handled eighteen times in the year, or whether it was an accumulation of eighteen $5,000 rolls. (III. R. 605.) None of this currency was deposited. We do not believe it can be seriously argued to this Court that there is any proof in this record from these currency-exchanging transactions at the Northern Trust Company in 1936 which shows that Sommers received $100,000 of income, or any other amount, much less that he paid this sum to Johnson. Obviously this money was just what it purported to be, working money used at the craps tables. When it became

worn it was exchanged. The money taken away by Sommers was in the denominations of money he used in his business and there is simply nothing in the record on which to conclude that more than $5,000 of currency was actually involved in these transactions. The only reasonable conclusion to draw is that a $5,000 bankroll was turned over eighteen or twenty times during the year. This knocks the $100,000 item out of the summary.

Now let us take a look at the item of $255,415.97 representing the proceeds of checks cashed at the Albany Park Currency Exchange. When the Northern Trust Company got tired of doing a free banking business for Sommers, it was suggested that he make other arrangements for cashing his checks and he went to the Albany Park Currency Exchange and made a deal to have his checks cashed for a fee of 25¢ a hundred. (II. R. 476.) The transactions from June through December 1936 appear on Government Exhibits X-139 to X-145. These records show the amount, the maker, the payee and the last endorser of each check cashed. Of the checks on X-139 which Marcus identified as coming from gambling houses in June, 1936, 213 were made by corporations. It is quite unlikely that any of these checks covered gambling losses. It would appear that these corporation checks were cashed by Sommers or Kelly or Hartigan as an accommodation either to the maker or the payee. Marcus testified that some of the checks which bore Sommers' endorsement were cashed by him for others. (II. R. 496.) A similar situation will appear from an examination of the other six exhibits. There is no proof in the record as to what portion of the checks, identified as cashed by these gambling house operators, were gamblers' checks and certainly no proof that the total of these checks represented gross receipts, much less net income, of these gambling houses. Each day's transaction was separate and distinct from those of every

other day. None of the proceeds were deposited and there is no proof that the proceeds carried away from cashing checks on Monday were not tied up in the checks that were brought back for cashing on Wednesday. If we assume that a batch of these checks was cashed three or four times a week, then in the seven months there would have been about one hundred batches cashed. This would mean that the average of the batch of checks cashed on each visit would be about $2500. There is nothing to show that the same $2500 was not turned over one hundred times in these check-cashing transactions to produce the aggregate of $255,415.97. To argue that there is any proof that this represents net income, or even gross receipts of anyone is attempted self-deception.

The next item of $6700 is characterized as currency "deposited" at Albany Park Currency Exchange. Exchanges are mere depots for cashing checks and making change and have no facilities for taking deposits. What the attorneys for the Government mean by this item is that it is estimated by agent Clifford that the transactions involving exchange of currency by gambling houses at the Albany Park Currency Exchange in 1936 totalled $6700. Marcus said these transactions consisted only of exchanging soft bills for new fives, tens, twenties and hundreds. (II. R. 491.) Government Exhibits under X-191 are slips showing transactions between the Albany Park Currency Exchange and the Milwaukee Avenue National Bank. The first of these exhibits bears date July 24, 1936 and shows the deposit of $5,000 in currency and of ninety checks totaling $4,933.61. Exhibit X-191 (b) bears date October 18, 1936 and shows the deposit of ninety-three items totalling $4,423.05, with no indication whether the items were currency or checks or who got the proceeds. It is from these exhibits that agent Clifford guessed that Sommers, Kelly and Hartigan exchanged currency in the

amount of $6700 in 1936, by assuming that all of the currency "deposited" was worn bills brought in by these men, except a few items that he deducted following days when he assumed Marcus might have taken out more currency than he needed to cash payroll checks. (III. R. 750.) Marcus admitted on cross-examination that he could not tell from his slips how much money Sommers, Kelly and Hartigan exchanged. II. R. 492.

The fifth item, $11,600, is a supposed total of $100 bills received by Flanagan from the Lawndale Currency Exchange in his check-cashing and currency-exchanging transactions. There is no use spending time with this item even if it were considered as gross receipts of Flanagan's gambling houses. It was Flanagan's income, and there is nothing to show that the net of $5,475 returned by him for 1936 was not the total of his net income. There is no proof that Johnson ever received a dollar of this money.

The Government accountant in summing up assumed that the aggregate of all of the check-cashing and currency-exchanging transactions listed at page 52 of the brief for the Government, as well as the aggregate of similar transactions of Andrew Creighton who was acquitted, represented not only the net income of the gambling houses but that it represented the taxable income of the defendant Johnson. He testified over objection that Johnson's income for 1936 was $547,942.38. (III. R. 742.) Under the most elementary principles, established by an unbroken line of authorities, it was error to permit this Government agent, with the blessing of the trial judge, to decide this case and announce to the jury that defendant Johnson had failed to report all his taxable income and had evaded payment of income tax as charged in the first count of the indictment. (*United States* v. *Spaulding*, 293 U. S. 498, 506; *United States* v. *Stephens*, 73 Fed. (2nd) 695, 704;

Wilkes v. *United States*, 80 Fed. (2nd) 285, 291; *United States* v. *Cole*, 82 Fed. (2nd) 655, 657.) In *Singer* v. *United States*, 58 Fed. (2nd) 74, 77, it was held error for the Government accountant to state the conclusion that a defendant's bank deposits were his taxable income. By its ruling the trial court substituted trial by government agent for trial by jury.

The argument of the attorneys for the Government in their present brief is as fantastic as the mental gyrations of this Government agent at the trial. There simply is no proof that the income of the gambling houses named in the indictment was $485,294.57, or any other determined amount in 1936, and there is a complete absence of evidence that Johnson received a dollar of this money. As the Circuit Court of Appeals well said, (I. R. 194-195,) even if it be assumed that Johnson had some interest in these gambling houses and derived some income from them, there is no proof that the income so derived exceeded the $173,382.90 which he reported in 1936.

As to Count 2—Year 1937.

The attorneys for the Government built up as the "total income of gambling houses," and so the income of defendant Johnson for 1937, the sum of $852,890.56 consisting of four items:

Checks cashed at Albany Park Currency Exchange	$623,690.56
Currency deposited Albany Park Currency Exchange	87,100.00
$100 bills received from Lawndale Currency Exchange	42,100.00
Currency exchanged at Northern Trust Company	100,000.00

No useful purpose will be served by taking these various items apart and showing the rottenness at the core. The checks cashed from January to September 1937 are shown on Government Exhibits X-146 to X-154. Of the 965 checks listed on the sheet for July 1937, X-152, which were in any way identified with gambling houses, 306

were made by corporations and the amounts and payees named indicate that most of them were payroll checks. We think it reasonable to conclude that these checks were cashed by Sommers, Kelly or Hartigan as an accommodation to employees of these corporations who lived in the neighborhood and who had no banking connections. It must be remembered that Sommers operated a restaurant on the ground floor at 4721 North Kedzie (III. R. 782) and it may be assumed that most of these checks cashed as an accommodation were cashed there. There is no evidence to show what part of the checks cashed by Sommers were cashed in his gambling houses or were given to cover gambling losses, and there is certainly nothing to indicate that the proceeds of these checks represented profits to Sommers.

If gambling house checks were cashed at the exchange every day during the first nine months of 1937, as the manager testified, the average of the daily check-cashing transactions would have been about $2500. Whether this total of $2500 in checks from the three customers was turned over 250 times, so there was only $2500 actually involved in the transactions, or whether there was some profit represented in the checks cashed does not appear from the evidence. It is sheer speculation to say that this $623,690.56, which is merely the aggregate of all the 250 or more check-cashing transactions, is an amount of net income. There is no proof that it is even the amount of gross receipts.

The $87,100 mentioned was not "deposited" at the exchange, but merely represents another guess based on Government Ex. X-191 as to the aggregate of many currency-exchanging transactions. There is here no proof of net income, or even gross receipts, of gambling houses. The $42,100 item is likewise a mere aggregate of the currency-exchanging and check-cashing transactions of

Flanagan and does not represent an accumulated sum identifiable as income of Flanagan's houses. Nothing further need be said about the $100,000 picked out of the air as an amount of "income," this being merely the aggregate of currency exchanged at the Northern Trust Company as already explained.

Clifford announced to the jury that Johnson's taxable income in 1937 was $1,047,129.77. (III. R. 743.) He arrived at this figure by adding together not only the transactions shown in the summary at page 52 of the brief for the Government, but also Creighton's transactions at the Mid-City National Bank. Again we point out that there was not a syllable of proof that Johnson received any income from any of these houses, or that he had the slightest connection with any of the transactions which it is assumed revealed the *amount* of gambling house profits and so of Johnson's income. If it be held that the jury could have concluded from the isolated incidents showing Johnson's relations with the co-defendants who operated some of the gambling houses named in the indictment, that he had *some* interest in these gambling houses and received *some* of the profits derived from their operation, "to say that his interest in the gambling houses was such as to entitle him to an income greater than that reported is to indulge in rank speculation," as the Circuit Court of Appeals found. (I. R. 195.) The record is barren of evidence to support the verdict of the jury that Johnson had a greater income in 1937 than the $264,177.63 which he reported.

As to Count 3—Year 1938.

Clifford testified that Johnson had taxable income in 1938 of $935,353.80. (III. R. 744.) By excluding the Creighton transactions the attorneys for the Government

now calculate Johnson's income for 1938 to have been $850,994.20 made up as follows:

Checks cashed at Albany Park Currency Exchange	$376,783.14
Currency deposited at Albany Park Currency Exchange	141,000.00
$100 bills received from Lawndale Currency Exchange	19,800.00
Currency exchanged at Northern Trust Company	100,000.00
Checks deposited by Lawrence Avenue Currency Exchange at North Shore National Bank	66,305.29
Checks deposited by Lawrence Avenue Currency Exchange at Central National Bank	147,105.77

Sommers, Kelly and Hartigan did business with the Albany Park Currency Exchange from January to July 1938. No other defendant patronized this exchange. The transactions are shown on Government Exhibits X-158 to X-164. There is no proof that the total of checks cashed, $376,783.14, is the amount of gross receipts, much less net income, of the gambling houses. This total does not represent an amount of accumulated receipts but merely an aggregate of many turn-overs. There is not a syllable of proof that $141,000 of currency was "deposited" by the gambling houses, as the summary represents. As explained under 1936, this item is merely agent Clifford's guess as to the total of the currency-exchanging transactions based on the assumption that all "deposits" of currency shown by the exhibits marked X-191 represented worn bills brought in from the gambling houses. The $19,800 item and the $100,000 item are simply more of the same and need no further discussion.

We come now to the Lawrence Avenue Currency Exchange, concerning which the prosecution drew on its imagination to an amazing degree. The whole argument of the attorneys for the Government is based on the assumption that Brown and his partner, who opened and operated the exchange, did not own it; that the exchange was established by defendant Johnson as a private place to carry on the check-cashing and currency-exchanging operations of a string of gambling houses which it is as-

sumed he owned; that all of the checks which were not cashed immediately, but which were sent to the correspondent bank to be cashed were profits from houses operated by Sommers, Kelly and Hartigan, whom it was assumed were merely employed managers for Johnson; and that the aggregate of the transactions carried in a so-called "Reserve for Uncollected Funds Account" represented profits of the gambling houses, and so represented taxable income of defendant Johnson. (Brief, pp. 55-60.) It does not seem to deter these attorneys that there is no evidence in the record worthy of the name, which even tends to establish these assumptions.

The sole basis for the contention that defendant Johnson was identified with the so-called "Reserve for Uncollected Funds Account" on the books of the Lawrence Avenue Currency Exchange is the testimony of the witness Bagshaw that co-defendant Brown referred to this account as the "Johnson Account." (II. R. 535, 566.) If in so referring to this account Brown was referring to defendant Johnson, then the testimony of Bagshaw was clearly hearsay. (*McWhorter v. United States*, 281 Fed. 119, 122; *Poole v. United States*, 97 Fed. (2nd) 423, 425.) If Brown was not referring to defendant Johnson, but to some other person or to some corporation, then the testimony was immaterial. Bagshaw testified, on cross-examination, that he had never seen defendant Johnson prior to the trial and had never had any transactions with him and that his name did not appear on any of the exchange records. (III. R. 542-544.) Bagshaw's testimony on direct examination that Brown told him that the source of the "funds" in the Reserve for Uncollected Funds Account was "Mr." Johnson, (Gov. brief, p. 56,) was qualified on cross-examination when Bagshaw admitted that Brown did not indicate whether the "Johnson" to which he referred was a man or a woman or a

corporation. (II. R. 543.) Referring to Brown's alleged statement to Bagshaw, it is argued that "Although that admission was chargeable only against Brown, the evidence as to the method of business of the exchange permitted the jury to draw the same conclusion against the other respondents as to the nature of the reserve account." Perhaps the jury did use this hearsay testimony to draw just such an unwarranted conclusion against defendant Johnson.

It is argued that Johnson owned the building where the Lawrence Avenue Currency Exchange was located. (Brief, p. 100.) The sole basis for this argument is the testimony of Goldstein, a disreputable lawyer who was under indictment for perjury at the time he testified. (II. R. 65.) It is said that Goldstein's testimony was corroborated by the testimony of two employees of the building. Witness Koop, who had charge of the safe deposit vault, said that her employer was Goldstein and had been since July 20, 1937, and that she accounted to Goldstein for the receipts of the building. (III. R. 587, 590.) Witness Brandt testified that he was employed as janitor of the building by Goldstein and that Goldstein had been his boss since 1937. (III. R. 595, 599.) Johnson testified that he had no interest in this property and had not advanced the purchase price or any part of it. (III. R. 955.) Title to this property was taken in the name of Goldstein's son (II. R. 57) and it still remains there. There is no proof in this record that Johnson ever had anything to do with the operation of this building, received a dime of income from it, paid any taxes on it, or did any other act which would indicate that he was the owner. To bolster their weak case on this point, attention is called to the fact that the attorney for defendant Johnson stated in his opening statement to the jury that Johnson had an interest in this building. (Brief, p.

100.) Floyd E. Thompson, who has appeared for defendant Johnson throughout this litigation, was employed in the afternoon of the day before the case was called for trial and in the short time available he undertook to get this complicated story in his mind and to make an opening statement to the jury on the second day of the trial. An excerpt from the opening statement appears in the record. (Pp. 3-4.) A mere reading of this excerpt shows that it is inaccurately reported. Throughout the trial no reference was ever made to this part of the opening statement and so the error in stating the facts relative to this particular building was not called to the attention of Johnson's attorney. Opening statements of counsel are not evidence. The statement was not an admission made during the course of the trial for the purpose of dispensing with proof, and the prosecution did not rely on the statement as an admission. It made its proof by Goldstein (II. R. 57) and then defendant Johnson denied that he purchased this property. (II. R. 955.) We submit that the facts and circumstances in evidence corroborate Johnson.

Brown's testimony before the grand jury to the effect that defendant Johnson had no connection with the exchange and no interest in any of the transactions of the exchange, (III. R. 674, 675,) was read to the jury by the prosecutors, was uncontradicted and cannot now be disclaimed by the Government. The testimony that records of the exchange were destroyed (III. R. 628, 641, 739,) was hearsay as to Johnson and highly inflammatory and prejudicial. Testimony regarding this exchange was received against all defendants. II. R. 533.

The statement in the summary that checks to the amount indicated were "deposited" in the North Shore National Bank and in the Central National Bank is misleading. Brown took checks to these banks to be cashed and listed

them, but the proceeds of the checks were not deposited. The proceeds of these checks were delivered immediately to the exchange and were in turn delivered to Sommers or others who had presented the checks to the exchange to be cashed. The total $66,305.29 means merely that this is the aggregate of all of the several check-cashing transactions the Lawrence Avenue Currency Exchange had with the North Shore National Bank, and the total of $147,105.77 means merely the aggregate of the check-cashing transactions which the exchange had with the Central National Bank in 1938. There were no "funds" in the so-called "Reserve for Uncollected Funds Account." This "account" was merely a running accumulation of memoranda of day by day check-cashing transactions. This "account" was rank hearsay as to defendant Johnson.

Notwithstanding there was no proof that any of this $850,994.20, indicated as "total income of gambling houses" in 1938, (Gov. brief, p. 53,) was profit to anyone or that Johnson ever received a dollar of it, the evidence relating to the transactions involved was received as proof that the aggregate of the turnover of the moneys represented by the innumerable transactions involved, was part of Johnson's income for the year 1938.

There is no legal evidence of the *amount* of gross receipts of the gambling houses in 1938, and so none of net income.

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As to Count 4—Year 1939.

Except for the item of $40,000 identified as "currency exchanged at Northern Trust Company," which represents merely the aggregate of some ten or twelve transactions, the total of the amount charged to defendant Johnson as income from gambling houses for 1939 was $886,499.30, represented to be checks "deposited" by the Lawrence

Avenue Currency Exchange at the Central National Bank. We have already seen that no proceeds of checks were deposited at the Central National Bank and that the total given is merely the aggregate of the checks that agent Clifford figured by some round-about process were the checks cashed by gambling house operators at the Lawrence Avenue Currency Exchange in 1939. (Gov. Br., p. 60.) By including the Creighton transactions Clifford testified that Johnson's income for 1939 was $961,504.77. (III. R. 745.) This was mere guessing. There was no proof of the *amount* of money actually involved in the check-cashing transactions at the Lawrence Avenue Currency Exchange and no proof that any of the proceeds of these checks were gross receipts, much less net income of anyone.

Not a dollar of this money was traced into Johnson's hands. We think it must clearly appear to the Court that there is no proof that Johnson received income in 1939 in excess of the $269,048.48 which he reported.

By this analysis we think we have demonstrated conclusively that the *sole* basis for the *amount* of defendant Johnson's alleged income,—the aggregate of the check-cashing and currency-exchanging transactions,—is without substance. No amount of income of gambling houses in any year, greater than that reported by Johnson's co-defendants, has been proven. If the evidence of these transactions tends to prove the *amount* of any income, it is gross income. "There can be no presumption that the gross income and the net income from a business would be the same. Experience is quite to the contrary." *Anderson* v. *United States*, 11 Fed. (2nd) 938, 940.

The answer to the Court's second question must be in the negative.

Third Question.

To sustain the sentence of respondent Johnson on the first four counts on petitioner's "expenditure theory", must the record furnish proof that during some one of the four years referred to in those counts his expenditures exceeded reported income and were made in part from his unreported income received in that particular year?

Income for tax purposes is reported on an annual basis. In a tax evasion case each year constitutes a separate offense because the duty to file a return and pay the tax is one that recurs every twelve months. (*United States* v. *Sullivan*, 98 Fed. (2nd) 79, 80.) The aim of the income tax laws is to compel a return from each taxpayer in respect to the income which accrues to him during the period of each tax year, and the line is drawn sharply to mark off one tax period from another. (*Helvering* v. *National Contracting Co.*, 69 Fed. (2nd) 252, 254; *Burnet* v. *Sanford & Brooks Co.*, 282 U.S. 359, 363.) It seems obvious that this third question of the Court must be answered in the affirmative. The attorneys for the Government agree, (brief, p. 91,) and we shall not extend our argument on this point.

Fourth Question (amplified).

Does the record furnish proof under the expenditure theory that during some one of the four years referred to in the first four counts of the indictment defendant Johnson's expenditures exceeded reported income and admitted cash resources, and that these expenditures were made in part from unreported income received in that particular year?

On the trial the prosecution ignored entirely the annual periods fixed by the Internal Revenue Act for the reporting of income when it came to summarize on its expenditure

theory, and it sought to lump together the whole eight-year period covered by the returns received in evidence. Agent Clifford was permitted to answer over objection that the total amount of income reported over the period from January 1, 1932 to December 31, 1939 was $1,188,041.85, to which he added $68,000 as the amount of money defendant Johnson had on hand at the beginning of 1932, making a total of $1,256,041.85 in cash resources. (III. R. 741.) He was then permitted to state that the total amount of expenditures for the eight-year period was $1,730,391.39 and that the amount of excess of expenditures over available cash was $474,349.54. (III. R. 742.) Thus it appears that the prosecution, starting with January 1, 1932 as its base, and without recognizing the annual stops which the law provides, offered proof that Johnson's expenditures during the eight-year period aggregated more than the amount Johnson returned as income for that period. By their accountant the prosecutors said to the jury: "In some year or years during the eight-year period defendant Johnson did not report all his taxable income. You guess which year or years."

After deciding that this prosecution could not be maintained because the indictment was void, the Honorable Circuit Court of Appeals made some comment with respect to the evidence under the expenditure theory and stated the conclusion that as to the second, third and fourth counts of the indictment the proof was sufficient to present a jury question. (I. R. 195.) It is obvious that no analysis was made of the evidence under this theory and no attempt was made to state ruling principles of law. The Circuit Court of Appeals assumed that the chart which the attorneys for the Government had appended to their brief in that court was supported by the record; and it also assumed that where it appeared from the chart that Johnson's expenditures in any year exceeded his income as reported for that year plus what the chart showed he had

on hand at the beginning of that year, it was not necessary for the prosecution to establish by evidence that his expenditures were made in part from his unreported income received in that particular year. Neither of these assumptions were sound. As will appear from the figures used in the opinion below, the chart appended to the brief for the Government in the Circuit Court of Appeals was even further off on the figures relating to expenditures than the chart appended to the brief in this court. What we have said under our answer to Question 3 shows clearly that the Court below was in error in the rule of law it applied. The judgment entered by the Circuit Court of Appeals, reversing the judgment entered by the District Court, was right, notwithstanding the dicta appearing in the opinion following the discussion of the points on which the case was decided.

As to Count 1—Year 1936.

It is conceded that there is no evidence under the expenditure theory to support a conviction under Count One, so the Court's fourth question will be answered in the negative as to this count.

As to Count 2—Year 1937.

Under Count Two the attorneys for the Government assume that defendant Johnson accurately returned his income in every year prior to 1937 and they start off with the assumption that he had cash available for expenditure at the beginning of 1937 only in the amount of $202,919.89. Even on this assumption, there is no basis for the conclusion that Johnson's expenditures in 1937 exceeded the cash he had available for expenditure.

The statement of receipts and expenditures appended to the brief for the Government is not supported by the record. The time of payment of the item of $75,000 (assuming

Johnson paid it) included in the expenditures for 1937 is not definitely fixed by the evidence. The prosecution's own evidence shows that the initial purchase price of the Bon-Air Country Club property was paid by Goldstein several months after the latter part of 1937. (II. R. 57.) It was never contended on the trial that Johnson made this expenditure in 1937. On cross-examination agent Clifford included this item of $75,000 in the expenditures for 1938. (III. R. 764.) There is also included in the summary of expenditures in 1937 $35,515 for the 9730 South Western Avenue property. The sole basis for the two items which make up this total is the testimony of Goldstein where he states that he received from defendant Johnson a total of $13,115 which he used for acquiring some vacant lots at 97th and Western. (II. R. 56.) On cross-examination he admitted, when confronted with the deed which he delivered to defendant Johnson showing the conveyance of only a one-half interest in these lots, (II. R. 64,) that the other half interest was owned by William R. Skidmore. (II. R. 65.) From this evidence, only one-half of this item should be charged to Johnson. The only evidence in the record, other than that of defendant Johnson, with respect to the item $22,400 which covers the building erected on these lots, is that of Nadherny, the architect. He testified that this money was paid to him by William R. Skidmore. (II. R. 79.) He does not fix the time. No witness testifies Johnson made this expenditure in 1937. Clifford included both of these items in Johnson's expenditures for 1937, (III. R. 764,) and he stated on cross-examination that he ignored the testimony of Goldstein on cross-examination that Johnson acquired only half of this property, and the uncontradicted testimony of Nadherny that Skidmore furnished the $22,400 paid out for improvements. (III. R. 746.) There are other errors in the figures for 1937 which we discuss under the next count, but they need not be considered here.

Eliminating from the summary only these two items for which there is no proof that Johnson made the expenditures in 1937,—$75,000 and $22,400,—we have eliminated more than the $82,727.83 which appears in red and indicates the claimed excess of expenditures over cash receipts and admitted cash resources.

Even agent Clifford, who resolved all doubts against defendant Johnson and excluded or included items to suit his purpose regardless of the record, stated that Johnson had available in 1937 cash resources to meet all expenditures charged to him, if we assume that his living expenses did not exceed $5,000 a year. (III. R. 759-760.) He merely guessed that Johnson spent more than $5,000 a year notwithstanding he lived with his mother in an apartment.

Assuming, for the purpose of this argument, that all items of expenditure in and prior to 1937, as shown by the chart, are supported by the record, the prosecution fails to prove that in 1937 Johnson's expenditures were made in part from his unreported income in that particular year. What the summary shows is that Johnson's total expenditures in the six-year period from 1932 to 1937 inclusive were $985,624.23 and that his cash resources for the same period were $902,896.40 and that $82,727.83 of his expenditures were made from unreported income. But the summary does not show in which of the six years he failed to report all of his income. The contention that 1937 is the year when all taxable income was not reported rests solely on the assumption that all taxable income was reported in 1932, 1933, 1934, 1935 and 1936. This assumption that the return for 1937 was false and that the returns for the other five years were true finds no independent support in the supporting record citations appearing at the left of the chart. If recourse is had to other evidence in the record, on which the prosecution relies to support its alternate theory, and this evidence is given the

effect for which the prosecution contends, the falsity and not the truth of the 1936 return is proved. Surely the attorneys for the Government cannot seriously suggest to this Court that it approve as a basis for finding that Johnson had unreported income in 1937 one which they contend the record shows to be false. If, as is contended under the "ownership" theory, Johnson had an income from gambling in 1936 of $485,294.28 instead of $145,165.70 as reported, (Gov. brief, p. 66,) then he had at the beginning of 1937, not $202,919.89, as the chart shows, but $543,048.47. If the assumption that the return for 1936 is true cannot be indulged, on what theory can the attorneys for the Government be indulged in their assumption that the returns for 1932, 1933, 1934 and 1935 are true? Adopting the same liberty of assumption, which characterizes the contentions of the attorneys for the Government, it can be demonstrated that the false return was filed in 1935, or in any other year back to 1932. All that is necessary to prove by the chart that Johnson made the excess expenditures out of unreported income in the year 1934 is to assume that the returns for 1932, 1933, 1935, 1936 and 1937 were true. We have already seen that no inference of unreported income in a particular year can be drawn from the fact that expenditures exceeded reported income in that year, and so there is no basis in the chart, or the evidence on which it is based, for concluding that the 1937 return and not that for some prior year was false. Our suggestion that it is the 1934 return and not the 1937 return that was false is just as sound logically and just as well-grounded factually as the contention of the attorneys for the Government that it is the 1937 return, and not any of the other five returns, that was false. If a conviction can be sustained for one year out of six on mere proof that over a six-year period expenditures exceeded known cash resources plus reported income, then six convictions on six counts based on claimed evasion for each of the six years

can be sustained. In answering the Court's Question 3 in the affirmative, the attorneys for the Government have admitted that the burden is on the prosecution to prove that in 1937 Johnson's expenditures exceeded his income and were made in part from his unreported income received in that particular year. We submit in all earnestness that the prosecution has failed to point to record support that it has met that burden. To say that the unreported income, required to meet the assumed excess expenditures, was income received in 1937 and not in 1935 or some other of the six years is just guesswork.

This analysis of the record certainly furnishes a negative answer to the fourth question in so far as it relates to the second count.

As to Count 3—Year 1938.

This is the first year that offers any problem under the expenditure theory. When the attorneys for the Government come to consider this year they discard their theory that Johnson had an income of $485,294.57 in 1936 and of $852,890.56 in 1937, as they contend under the gambling house ownership theory. (Brief, p. 52.) Instead of the two theories of the prosecution complementing each other, they destroy each other. If Johnson had the income in 1936 and 1937 which the prosecution contends he had under the gambling house ownership theory, then he had abundant funds to meet the expenditures it is claimed he made in 1938. Even if the prosecution abandons its theory of income from gambling houses, the argument under the expenditure theory must fall for 1938 if the prosecution persists in contending that the proof shows under the expenditure theory that Johnson had a greater income in 1937 than he reported. If it be assumed that Johnson's return for 1937 is not a true return, then how can it be said that he did not have accumulated cash at the begin-

ning of 1938? There is no showing of the amount of this alleged unreported income of Johnson for 1937, and it would be quite a coincidence if it were exactly $82,727.83. By contending that there is unreported income for 1937, the attorneys for the Government have destroyed all basis for their argument for 1938 on their expenditure theory. They cannot point to any proof to justify their starting the "receipts" column for 1938 at zero.

Before a conviction can be sustained on the third count under the expenditure theory, the fact that Johnson had no available cash at the beginning of 1938, or the amount of cash he had available, if any, must be established by evidence. The contention that defendant Johnson spent more money in 1938 than he had available for expenditure rests on the assumption that he started out at the beginning of 1932 with $78,000 and that his returns for the years 1932 through 1937 were in all respects correct. If there is a lack of evidence to establish definitely the $78,000 figure or if the record does not support the assumption that in none of these six years Johnson had unreported income, then the base for the case on the third count under the expenditure theory has not been fixed. Even conceding the accuracy of the figures in the expenditures column, if Johnson had unreported income from prior years exceeding the alleged excess of expenditures over cash receipts and admitted resources in 1938, then there is a failure of proof. There is no evidence in the record as to 1938 or any previous year that defendant Johnson did not have cash receipts during the period which he was not required to report. There was no proof of net worth in any year. The prosecution starts from nowhere in 1938 in its effort to show that expenditures made in that year were made in part from unreported income received in that particular year and so it gets nowhere.

We think it will be conceded that if the $78,000 figure used as the amount of cash on hand at the beginning of 1932 is not established by the evidence, the Government has no base for its chart. This starting figure rests entirely on the testimony of agent Wilson that Johnson told him in January 1934 that on December 31, 1931, he had his bankroll of $10,000 and $68,000 in gambling profits in his safety deposit box. (II. R. 10.) We ask a careful reading of the testimony of this witness. We think it proves just what it says and nothing more. Comment is made, with emphasis, that we did not cross-examine this witness, (Gov. brief, p. 99,) but we think a reading of his testimony will confirm the judgment of Johnson's attorney that there was nothing to be gained by cross-examination. Wilson did not say that Johnson stated that he had no assets other than the $78,000 mentioned. The evidence shows that Johnson paid in 1932 on his income for 1931 substantially the same tax he paid in 1933 on his reported cash receipts of $74,553.85 for 1932, and so we may assume his reported taxable income was about the same for both years. Johnson testified that during the course of his conversation with agent Wilson some time during 1934, which related to Johnson's 1931 return, there was discussion of an item of $78,000 plus which appeared on his return as income from gambling, and that in response to a question from Wilson as to what he had done with this money he answered that he kept about $10,000 of it in his active bankroll and that he put the remainder in his box where he kept his gambling gains. (III. R. 960.) If Johnson's 1931 return did not show this item of $78,000 the prosecution had plenty of opportunity to prove it. We respectfully submit that there is no substantial conflict in the version of this interview as stated by Wilson and as stated by Johnson. Certainly there is reasonable explanation in honest misunderstanding or faulty recollection by Wilson of the apparent difference in the versions

of the interview. No memorandum of this interview was produced at the trial.

There is nothing in the record to corroborate the theory that Johnson started the year 1931 without a dime and that he had at the end of the year only the $78,000 he had accumulated that year and reported as income. Johnson is abundantly corroborated in his testimony that he must have had between $140,000 and $150,000 in his box in addition to the $68,000 he put in it in 1931. (III. R. 960.) The amount of tax paid by Johnson for the year 1931 would indicate that he reported in that year a taxable income of some $70,000, which with normal deductions and exemptions would mean cash receipts of about $80,000. After the audit of his 1931 return in 1934 he paid an additional tax under an agreement that he had income in 1931 of some $40,000 which he had not reported and about which there was a dispute as to whether it should have been reported. (In passing, it may be said that this is the only time in the twenty years Johnson has been filing returns that he was assessed the negligence penalty of 5%.) According to the income tax paid for 1931, it appears that Johnson had an income in that year of about $120,000. In addition to this income the prosecution proved on cross-examination of Wait that Johnson invested about $100,000 in the Lawndale Kennel Club and that Johnson got this money back by arrangement with the Hawthorne Club before 1932. (III. R. 903-904.) Assuming that Johnson had no other available cash in 1931 than the $100,000 which he got from the Hawthorne Club and assuming an income of about $120,000 in 1931, he had over $200,000 cash on hand at the beginning of 1932. He says he had not less than $218,000 in his box. III. R. 960.

Let us now analyze the case on expenditures for 1938, as made by the statement of receipts and expenditures appended to the brief for the Government. Under cash

receipts there is omitted for 1932 a deduction on the return of $935.01, for 1933 of $247.50, and for 1934 of $990, being the pro-rated portion of commissions paid in 1930 relative to Lincoln Park Building. There is also omitted the non-taxable interest received on the $5,000 of Liberty Bonds purchased in 1933 of $162.50 for each of the years 1934 to 1938 inclusive. From the listed expenditures for 1933 should be deducted the $8,000 discount on the purchase of the $30,000 face amount of second mortgage notes, and from the listed expenditures for 1934 the $8,500 which is the excess of the estimate of the cost of the Lincoln Park Building equity. Under expenditures for 1936 the $10,000 item labeled "Dells Purchase" should be added to the $12,115.90 in the 1937 column and one-half of the total charged to Johnson in 1937. Under the expenditures for 1937 the $75,000 listed as the purchase price of the Bon-Air Country Club, and one-half of the $35,515 listed as the cost of land and improvements at 9730 South Western Avenue should be eliminated. There should also be deducted from the farm expenditures $4,908.30 which is the unlocated difference between the figures of Government accountant Clifford and Johnson's accountant Sullivan. The purchase price of the Albany Park Bank Building, $59,887.05, should be deducted because this building was bought by Goldstein and title was taken in the name of Goldstein's son and Goldstein was the sole manager of the building and Johnson made no expenditure in connection with the purchase. It will also be noted that Johnson is charged with $10,000 living expenses in 1938, notwithstanding his farm books show personal expenditures of $3,238.14, which is also added. From the 1938 expenditures listed there should be eliminated the Skidmore loan of $37,000 which was made and paid the same year, and one-half of the payments relative to Bon-Air Country Club amounting to $184,498.83, made by Skidmore. With these and other corrections, which are supported by the

record, we find that Johnson had available for expenditure in 1938, $376,201.80 and that he spent $342,660.04, leaving an excess of cash available over cash spent of $33,541.76. Facts, our first brief, pp. 18-33.

Under their expenditure theory the attorneys for the Government face the dilemma of assuming that the returns for 1936 and for 1937, both of which they challenge, are true returns or of destroying their base for making their calculations for 1938. Without a syllable of proof to support their assumption they make their comparison of receipts and expenditures as to 1938 by assuming that Johnson started the year without one cent. If the return for 1937 was false, then how much unreported income did Johnson have for that year? If the return for 1936 was false, how much income did Johnson fail to return for that year? If in any year prior to 1938 Johnson had unreported income, then there was available to him in 1938 whatever amount was unreported over and above the amounts which the statement of receipts and expenditures appended to the brief for the Government shows. If it be true that Johnson spent $488,561.23 in 1938, which we vigorously challenge, then the prosecution has wholly failed to prove that in this year Johnson's expenditures were made in part from unreported income received in that particular year.

The principal item of expenditure listed for 1938 is $273,940.93 charged to improvements at the Bon-Air Country Club. Charging *all* these expenditures to Johnson is an assumption based upon other assumptions. All contracts were let by Wait or Nadherny and all contractors were paid by Wait, Geary or Lightning Construction Company. Johnson let no contracts and paid no bills. (II. R. 89, 92, 122, 140, 142, 143, 144, 145, 168, 170, 228, 229, 230, 232, 259, 260.) Johnson testified that he made only half of these expenditures (III. R. 956), but, if his

testimony is rejected, there is abundant proof in the record that William R. Skidmore had *some* interest in this property and made *some* of the expenditures, and so there is no basis for concluding that Johnson made *all* of them. The argument that Johnson was the *sole* owner of Bon-Air Country Club and made *all* of the payments in the purchase and improvement of this property rests on the testimony of William Goldstein (II. R. 57) who was shown by cross-examination (limited by the trial Court, as it was, II. R. 67-68) and otherwise to be wholly unworthy of belief. Becker a witness for the prosecution, testified that the original payment was made by Goldstein (III. R. 574), that Goldstein negotiated the deal, and that he wrote a letter to Becker (Def. Ex. J-6) which stated that he was representing "clients". (Note the plural) Becker had no contact or dealings with any other person than Goldstein. (III. R. 575.) Bibow, the agent for the seller, said Goldstein told him that before the deal could be closed he would have to see "a couple of other people". (III. R. 576.) These expressions do not prove that Johnson was one of the clients, but it certainly proves Goldstein was not representing Johnson only. Hare testified that in the early part of 1937 he, as agent for Skidmore, had some negotiations with the agent for the bondholders with respect to the purchase of Bon-Air. (III. R. 914.) Later he took Goldstein to Becker to discuss the deal and Goldstein said that the asking price was too much but that if the bondholders made up their minds to take $60,000 he would put the money up in escrow. Hare had no further part in the negotiations. (III. R. 915.) Wait testified that Skidmore told him sometime in December 1937 that he was buying this property; that Johnson later became interested and that he became the manager in 1938 for Skidmore and Johnson; that during the operation of the club Johnson would be there nearly every day and night for two or three hours and Skidmore would be there

a couple of times a week; that he got the money to pay bills from Johnson and Skidmore, who were supposed to contribute half and half, but that he did not know exactly the amounts contributed. (III. R. 896-8.) Skidmore furnished Wait many thousand dollars directly. (III. R. 897.) Nadherny, the architect, testified that part of his fees was paid by Skidmore and part by Johnson. (II. R. 81.) Spagat testified that in April 1938 he began work at Bon-Air as catering manager and that both Skidmore and Johnson participated in the management of the club. (III. R. 893-4.) Davis, the painting contractor, testified that during his work there he saw Skidmore around the premises two or three times a week inspecting the construction that was going on and that he had a conversation with Skidmore, Johnson and Wait about their family name shields that were placed in the bar at Bon-Air. During the three months he worked at Bon-Air he often saw Skidmore talk with Johnson and Nadherny. (III. R. 916.) Goldberg, the electrical contractor, testified that he saw Skidmore there on numerous occasions and had conversations with him pertaining to the work he was doing there. On one occasion Wait paid him $2,500, which was part of $5,000 that Skidmore gave Wait in his presence at the club. (III. R. 916-17.) Thele, formerly vice-president of a wholesale grocery company, testified that his concern did business with Bon-Air Catering Company beginning in May 1938, and he identified Defendant's Ex. J-7(a-e) (five ledger sheets headed "Skidmore and Johnson, Bon-Air Country Club, Wheeling, Illinois") as records kept in the regular course of business. (III. R. 919-20.) Tatge, who formerly owned the "Greenhouse", testified that when he sold the house there was a pool table in the basement which Skidmore bought and told him to leave. (III. R. 922.) Boeye, the greens keeper, testified that he saw Skidmore on the grounds occasionally, that the grass seed that was used on the club property was delivered by Skid-

more's trucks and that he saw the same trucks haul corn from the Curran farm, which was part of Bon-Air. Skidmore's manager got gasoline at Bon-Air to operate Skidmore's trucks and his tractors which were used on the Curran farm. Boeye's crew hauled some peat moss from Skidmore's farm to the club at the direction of Skidmore. In 1938 Skidmore's trucks hauled about 250 yards of sand to the club's golf course. (III. R. 925.) Rose, employed at Bon-Air as dance producer and director of shows, testified that he consulted with Skidmore and Johnson relative to the shows he produced at Bon-Air and the price of the acts. (III. R. 923.) Meyer testified that while he was doing cement work at Bon-Air he saw Skidmore around the place, and that in the Fall of 1937 he was sent down to The Dells to help tear down some old buildings and the salvaged lumber was loaded onto Skidmore trucks. (III. R. 928.) Allan, of the sales department of the Sinclair Refining Company, identified Defendant's Exhibits J-9(a) to J-9(bbb) (invoices headed "Bon-Air Country Club, W. R. Skidmore, Wheeling, Illinois") as delivery tickets prepared by the driver at the time of delivery (III. R. 929), and he testified that purchases for Bon-Air were under the same quantity discount contract as Skidmore's Pine Tree Farm and Skidmore's Lawndale Scrap Iron Company. (III. R. 930.) Defendant's Exhibits J-11 and J-12 are certificates of title to trucks owned by Bon-Air Country Club, which bear the signature of William R. Skidmore. (III. R. 956.) On this uncontradicted evidence of Skidmore's interest in Bon-Air, we submit that there is no basis for assuming that *all* of the expenditures made at Bon-Air were made by defendant Johnson. Skidmore certainly made *some* of them.

In light of the fact that there is a total failure of proof as to the amount of cash which defendant Johnson had available for expenditure at the beginning of 1938 and of

the fact that there is a failure of proof as to the amount of expenditures made by Johnson in this year, we think the Court's fourth question must be answered in the negative in so far as it relates to the third count.

As to Coun. 4—Year 1939.

Without lengthening this brief by going into the details as to 1939, we respectfully submit that the proof as to this year is subject to the same infirmities as that for the year 1938. Here again the prosecution faces the dilemma of asserting the truth of the returns of Johnson for 1936, 1937 and 1938, all of which they challenge, as well as the truth of the returns for 1932 through 1935, or of destroying their base for calculating that Johnson's expenditures in 1939 exceeded his available cash at the beginning of 1939 plus his reported income for that year. Whatever probative value the income tax returns have, all such returns *prima facie* have the same probative value. Each standing alone proves as much or as little as any other. In the absence of independent evidence showing which is true and which is false, the attorneys for the Government may not arbitrarily assert the truth of some and the falsity of others solely on their contention that all of them cannot be true.

Again the prosecution starts off with the assumption that Johnson did not have one cent accumulated at the end of 1938, but, as we have seen, this assumption rests on other assumptions. To assume that it was the 1939 return and not the one for some other of the eight-year period which was false is pure conjecture. If, as the prosecution contends under its "expenditure" theory, Johnson had unreported income of $357,079.98 in 1938 and $82,727.83 in 1937, by what process of reasoning does it assume that he did not have an even greater unreported income in these years and so accumulated cash available

for expenditure in 1939 in excess of the $[illegible]0,580.05 which it says was his expended unreported income for 1939? If Johnson had an income of $485,294.57 in 1936 and of $852,890.56 in 1937 and of $850,994.20 in 1938, as the prosecution contends under its "ownership" theory, then Johnson had money to burn in 1939.

The whole argument of the attorneys for the Government under the expenditure theory comes merely to this: In some year between 1932 and 1940 Johnson had unreported income; and without proof of the year in which he filed a false return, it may be assumed that the false return was filed in the year when his expenditures exceeded his reported income in that particular year. This sort of reasoning is without foundation in logic or law. If it is countenanced then a convenient way is opened to the Government to evade the bar of the six-year Statute of Limitations by basing the charge on the year of excess expenditures regardless of the year when all income was not reported.

The apparent deficiency of available cash to meet alleged expenditures might result from any one of a number of errors which would not involve criminal conduct on the part of the taxpayer. There may have been receipts over an eight-year period which the taxpayer was not required to return. There may have been receipts which should have been included in the income reported but which the taxpayer omitted inadvertently or which he may have omitted because he honestly but erroneously believed they should not be included. The apparent deficiency may result from errors in arithmetic or from some other of many other possible errors. Whatever the reason for the apparent excess of expenditures in one or more of the years of an eight-year period over the total of the admitted cash resources plus reported income, we submit that the burden is on the prosecution to establish by legal evidence beyond a reasonable doubt that the defendant is guilty of attempting to evade income tax in an indictment year by proving

that the expenditures made by him in that year were made in part from his unreported income received in that particular year. The rules of burden of proof and quantum of evidence in income tax evasion cases are the same as in other criminal cases. Unless the prosecution produces proof which excludes every other hypothesis but that of guilt, the defendant must be acquitted. No defendant has the burden of proving his innocence. This is a humane provision of the American system of criminal justice because it is recognized that one cannot always prove his innocence, however innocent he may be. No citizen should be deprived of his liberty under a judgment based on mere guesswork.

We respectfully submit that the record shows that Johnson had available for expenditure in 1939 $303,768.46 and that he spent only $234,907.62. (Facts, our first brief, pp. 18-34.) All contentions to the contrary are based upon inference piled on inference.

In view of the fact that the record affords no support either for the assumption that defendant Johnson started off with nothing at the beginning of 1939 or that he made all the expenditures which are charged to him, we respectfully submit that the record fails to show that any expenditures made by Johnson in 1939 "were made in part from his unreported income received in that particular year". This being true, it follows that the Court's fourth question must be answered in the negative as to the fourth count of the indictment.

As to Count 5—Conspiracy.

Inasmuch as no contention is made that the conspiracy is proved by the "expenditure" theory, we assume we are not called upon to demonstrate that the verdict on this count cannot be sustained on this theory. It seems too obvious to require argument that the answer to Question 4 as it relates to this count must be in the negative.

Conclusion.

We earnestly contend that the judgment of the Circuit Court of Appeals reversing the judgment of the District Court should be affirmed on the following grounds:

The grand jury that returned the indictment was without authority to act when the indictment was returned. Our first brief, pp. 42-56.

The indictment is void for insufficiency, uncertainty, duplicity and repugnancy. Our first brief, pp. 56-61.

There was a total failure of proof to establish the guilt of defendant Johnson under any count of the indictment and a verdict of not guilty should have been directed. This brief; and our first brief, pp. 61-88.

If the Court should be of the opinion that none of these grounds for affirmance of the judgment of the Circuit Court of Appeals can be sustained, then we earnestly contend that serious and prejudicial error was committed on the trial and that justice requires that a new trial be granted. Our first brief, pp. 88-118.

The attorneys for defendant, William R. Johnson, greatly appreciate the submission of the questions and the opportunity to re-argue their contention that this record does not contain legal evidence to support the conviction under any count of this indictment. We hope that we have been of service to the Court in answering its questions.

Respectfully submitted,

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